ESSAY

The Trouble with Corporate Conscience

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Accomplished corporate law scholars claim that modern businesses need an infusion of morality. Disappointed by conventional regulatory responses to recurring corporate scandal, these scholars argue that corporate conscience provides a more fruitful path to systemic economic reform. In Burwell v. Hobby Lobby*, which held that for-profit businesses can claim religious exemptions from general laws, the Supreme Court gave this notion of corporate conscience added momentum. Emboldened by the Court's embrace of business goals extending beyond shareholder profit, proponents of a moralized marketplace now celebrate corporate conscience as an idea whose time has come.*

This Essay criticizes the leading arguments for corporate conscience. These arguments identify three plausible sources of corporate morality—shareholders, managers, and society as a whole. Although initially appealing, each account ultimately proves impractical, illegitimate, or self-defeating. These shortcomings not only give us reason to reject existing accounts on their own terms, but may also reveal a more accurate and attractive picture of the modern corporate world.

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INTRODUCTION

For decades, corporate America has been plagued by scandal. From fraudulent accounting at Enron[1] to safety shortcuts precipitating the BP oil spill[2] to phony bank accounts at Wells Fargo,[3] public corporations have grown accustomed to legal and ethical failure. Predictably, corporate scandals beget tighter corporate regulations.[4] But the modern business world moves quickly, and sophisticated market actors always seem one step ahead of systemic solutions.[5]

Dissatisfied with conventional regulatory responses, prominent corporate law scholars call for fundamental reform of the way we do business.[6] In their view, corporate leaders have been led astray by

1. *See* John R. Emshwiller & Rebecca Smith, *Behind Enron's Fall, a Culture of Secrecy Which Cost the Firm Its Investors' Trust*, WALL STREET J. (Dec. 5, 2001), https://www.wsj.com/articles/SB1007502843500372680 [https://perma.cc/ASN7-WFH8].

2. *See* John M. Broder, *BP Shortcuts Led to Gulf Oil Spill, Report Says*, N.Y. TIMES (Sept. 14, 2011), http://www.nytimes.com/2011/09/15/science/earth/15spill.html [https://perma.cc/S49R-UXJ7].

3. *See* Patrick W. Watson, *Wells Fargo Scandal Shows Next Bank Crisis Coming*, FORBES (Sept. 15, 2016, 8:19 AM), http://www.forbes.com/sites/patrickwwatson/2016/09/15/wells-fargo-scandal-shows-next-bank-crisis-coming/#690162e869ec [https://perma.cc/F6PR-8CB3].

4. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (2002); Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Increased Safety Measures for Energy Development on the Outer Continental Shelf, 30 C.F.R. § 250 (2012); Rachel Witkowski & Emily Glazer, *Banking Regulator Imposes New Restrictions on Wells Fargo*, WALL STREET J. (Nov. 19, 2016), https://www.wsj.com/articles/banking-regulator-imposes-new-restrictions-on-wells-fargo-1479519295 [https://perma.cc/8HHP-CZY7].

5. *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882, 1002 (2015) (describing the finance industry as "non-stationary").

6. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012) [hereinafter STOUT, SHAREHOLDER VALUE MYTH]; Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83 (2010) [hereinafter Johnson, *Re-Enchanting*]; KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006) [hereinafter GREENFIELD, FAILURE OF CORPORATE LAW]. Sadly, during the editing process for this Essay, Professor Stout passed away at the age of sixty.

financial economists' narrow focus on economic self-interest and have lost touch with basic ethical principles. To remedy the excesses of our capitalist system, these scholars propose that we confront the amoral—or perhaps immoral—inclinations of modern business head on. What we really need, on this account, is more *corporate conscience*.[7]

The Supreme Court recently gave this notion of corporate conscience a shot in the arm. In *Burwell v. Hobby Lobby*, the Court held that for-profit businesses qualify as "persons" under the Religious Freedom Restoration Act and are therefore eligible to claim religious exemptions from general laws.[8] Commentators supporting this result made explicit reference to the idea of corporate conscience.[9] Indeed, one prominent scholar insisted that if we want businesses to act responsibly, they "must have the freedom to follow their consciences."[10]

The appeal to conscience is rhetorically powerful. Debates about "corporate social responsibility" and "social enterprise" have long been hampered by a lack of semantic and conceptual clarity.[11] But by

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7. *See, e.g.*, STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at ch. 8; Johnson, *Re-Enchanting*, *supra* note 6, at 97; Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 36 (2006) [hereinafter Johnson, *Faithfulness*]; GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at ch. 6; Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 329 (2015) [hereinafter Greenfield, *Corporate Persons*]; Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility through a Legal Lens*, 81 TEMP. L. REV. 831, 832–34 (2008); Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811 (2004); Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate Conscience*, 42 VAL. U. L. REV. 1129 (2008); Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645 (2002); Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, *in* PROGRESSIVE CORPORATE LAW 219, 234 (Lawrence E. Mitchell ed., 1995); Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet et al. eds., 2007); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 390 (2015); Leo E. Strine, Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration From Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165 (2017).

8. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

9. *See, e.g.*, Mary Ann Glendon, *Free Businesses to Act with Conscience*, BOS. GLOBE (Dec. 8, 2013), https://www.bostonglobe.com/opinion/2013/12/08/should-business-have-conscience/cK6o6G6dwrWeRJjk1uPVYM/story.html [https://perma.cc/6CKU-5FWJ]; Brett G. Scharffs, *Our Fractured Attitude Towards Corporate Conscience* (Mar. 12, 2014), https://ssrn.com/abstract=2445680 [https://perma.cc/8TG4-Y7E8].

10. Glendon, *supra* note 9.

11. *See* Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 COLUM. L. REV. SIDEBAR 39 (2015) (criticizing Delaware Supreme Court Chief Justice Leo Strine's recent argument for corporate social responsibility); Elizabeth Pollman, *Social and Asocial Enterprise*, *in* THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW (Benjamin Means & Joseph W. Yockey eds., 2017) (arguing that social enterprise is a "particularly amorphous term," due in large part to its adoption by different organizations for varying purposes). More than a decade ago, Professor Larry Ribstein observed that "the debate over corporate social responsibility

focusing on the problem of corporations' seemingly hollow normative core, theorists of corporate conscience have been able to coalesce around a morally resonant vocabulary and employ it to challenge conventional corporate theory. And in the short time since *Hobby Lobby*, these challenges have gained considerable momentum.[12]

This Essay tests the claims made by proponents of corporate conscience. To do so, it engages the three most sophisticated models of the argument, organized according to the source of corporate morality. The first model grounds corporate conscience in the "prosocial" nature of *shareholders*.[13] The second model holds that *managers* should make business decisions by following their own deepest moral commitments.[14] And the third model looks to the best interests of *society* as a whole, rather than the interests of shareholders or managers alone.[15]

Taking these models in turn, this Essay shows that each account of corporate conscience falls short. Part I begins by arguing that it is highly impractical to convert shareholders' moral values into corporate policy. As a descriptive matter, the shareholder-conscience model does provide helpful evidence of investors' prosocial impulses. But when it comes to implementation, the shareholder-conscience model does not identify practical mechanisms by which prosocial shareholders can overcome pervasive collective action problems, nor does it demonstrate that prosocial shareholders actually wish to do so.

Part II then explores the notion that rather than attempting to vindicate shareholders' moral values, managers should instead make business decisions in accord with their own deeply held convictions—especially their religious beliefs. It identifies the most persuasive case to be made in favor of this view, which focuses on allowing managers to live coherent lives by bringing their full selves into the business world. But these moralizing managers would also impose serious costs, both

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is often vague or unrealistic or both." Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1432 (2006). Despite his best efforts, more recent discourse about corporate social responsibility has not gained much in terms of clarity or precision.

12. *See* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014); Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777 (2015); *see also* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147) (exempting certain for-profit businesses with "religious beliefs or moral convictions" from the Affordable Care Act's contraceptive coverage mandate).

13. *See infra* Part I.

14. *See infra* Part II.

15. *See infra* Part III.

on shareholders and on other members of the corporate group. These costs, in turn, give us reason to question the legitimacy of managers using corporate resources to pursue their own moral agendas.

Looking beyond shareholders and managers, Part III explores the socialized model of corporate conscience. It begins by noting what this model has in common with the conventional account of corporate law, namely, a focus on social wealth as the ultimate end of the corporate system. But when it comes to the *means* of achieving that end, this Part argues that the socialized model goes awry. More specifically, by advocating that corporate managers aim directly at social wealth, rather than profit for their individual firms, this model ignores the competitive structure of the modern market economy. This structure encourages firms to compete in the hopes of increasing profits, and as a result of that competition, prices move to the point at which resources are allocated to their most valued uses. But without competition, the price mechanism cannot function properly, and markets become distorted. Although this distortion and accompanying inefficiency might conceivably be justified on egalitarian grounds, the socialized model does not make that case.

Finally, Part IV moves past theories of corporate conscience and takes some initial steps toward locating an alternative source of normative guidance for corporate practice. In different ways, the three leading models founder on the institutional details of modern firms and markets. But serious attention to these institutional details, and the values embedded in them, reveals a better way forward. This approach may not provide a comprehensive theory of corporate morality, but it does identify certain minimum requirements any such theory must satisfy.

Conversations about morality in business have a tendency to grow muddled. All too often, participants in these discussions talk past each other, either because they do not share a single conception of corporate responsibility or because they conflate multiple conceptions. By zeroing in on three plausible sources of corporate conscience, this Essay provides a common framework to facilitate deeper analysis. In doing so, it also shows how the most prominent arguments for corporate conscience fail to deliver a coherent and attractive view. This failure not only gives us reason to reject existing accounts on their own terms, but also leaves behind valuable clues for how to reconstruct a more sophisticated moral theory for the modern corporate world.

I. SHAREHOLDERS

This Part explores the claim that corporate conscience can be grounded in shareholders' interests. Although that claim rests on an appealing view of shareholders' moral psychology, it ultimately fails to account for powerful firm dynamics that block effective implementation. A dose of corporate realism here reveals that the shareholder-conscience view is highly impractical in modern corporations.

A. Prosocial Shareholders

The first model of corporate conscience aims to challenge conventional wisdom about shareholders.[16] On this view, financial economists and their allies in the legal academy have led businesses astray by obsessing over shareholder wealth. Laboring under unrealistic assumptions of investor selfishness and instrumental rationality, managers have failed to respond to the diverse array of values held by actual shareholders. Rather than resembling the mythical creature *homo economicus*, shareholders are real people who are more inclined to care about others than to ruthlessly pursue their own material advantage at every turn. Accordingly, corporate managers should be free to take their cues from prosocial shareholders rather than remain the slaves of conventional economic theory.[17]

The shareholder model begins with a rather expansive view of "conscience." On this account, conscience functions as a sort of stand-in for any behavior that is not strictly in pursuit of material gain. It even covers situations in which individuals fail to exploit positive law or the vulnerability of others to the maximum possible degree.[18] In these instances, people are theoretically leaving money on the table, which can be seen as the functional equivalent of altruism.[19] In focusing on "other-regarding" behavior, the argument from shareholder conscience largely casts aside inquiries into human emotion or motivation and prioritizes observable evidence of social cooperation.[20]

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16. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6.

17. *See id.* at 95–115.

18. *See* Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay for Performance*," 39 J. CORP. L. 525, 528, 540 (2014) [hereinafter Stout, *Killing Conscience*].

19. *See id.*; *see also* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 573 n.15 (2009) (defining altruism as including instances in which corporations do not evade taxes).

20. *See* LYNN A. STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2011) [hereinafter STOUT, CULTIVATING CONSCIENCE]; Stout, *Killing Conscience*, *supra* note 18.

In line with its emphasis on observable behavior, the shareholder-conscience model offers various kinds of empirical evidence in support of its claims.[21] Some of this evidence comes in the form of experimental studies designed to reveal the conditions under which people will engage in unselfish behavior. These studies show that, at least in social science laboratories, ordinary people do not consistently choose to maximize their own material wellbeing. Instead, they frequently act in a socially cooperative manner, seeking to benefit others as well as themselves.[22] This evidence is offered to demonstrate that conventional economic models make unrealistic assumptions about human behavior, which is much more inclined toward altruism and fairness than we have been led to believe.

A second source of evidence for shareholder conscience is the rise in socially responsible investments ("SRIs").[23] SRIs seek to integrate nonfinancial considerations—such as ethical, social, or environmental concerns—into investment decisions.[24] For example, Vanguard offers investors the FTSE Social Index Fund, which screens investments based on certain social, human rights, and environmental criteria.[25] Some estimate that the total value of SRIs in the United States exceeds $8 trillion.[26] For shareholder-conscience proponents, the rise of SRIs is yet more evidence that in addition to concerns for financial return, real shareholders have serious moral and ethical commitments.

A third source of evidence for shareholder conscience is the emergence of benefit corporations.[27] Benefit corporations are for-profit organizational forms that explicitly permit firm managers to promote a wide range of social goals other than shareholder value.[28] These hybrid organizational forms now exist in over thirty states,[29] including

21. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 47–102.

22. *See id.* at 97; STOUT, CULTIVATING CONSCIENCE, *supra* note 20, at 84–86.

23. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 98.

24. *See* Joakim Sandberg et al., *The Heterogeneity of Socially Responsible Investment*, 87 J. BUS. ETHICS 519 (2009).

25. *See* Vanguard Mutual Fund Profile: Vanguard FTSE Social Index Fund Investor Shares, https://personal.vanguard.com/us/funds/snapshot?FundId=0213&FundIntExt=INT (last visited Sept. 2, 2018) [https://perma.cc/Y79S-VFQC].

26. *See* US SIF, REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS (2016), https://www.ussif.org/files/SIF_Trends_16_Executive_Summary(1).pdf [https://perma.cc/TLK4-JCET].

27. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 98.

28. For a full list of benefit corporation legislation, see *State by State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status (last visited July 21, 2018) [https://perma.cc/QCW9-LFAL].

29. *See id.* (displaying thirty-four states that have passed benefit corporation legislation).

Delaware, the corporate law capital of the world.[30] Much like the evidence from experimental psychology and SRIs, the emergence of benefit corporation legislation is said to prove that shareholders have conscientious commitments that cannot be reduced to merely financial terms.[31]

In light of this empirical evidence showing that shareholders are prosocial—that they have "consciences"—the shareholder-conscience model holds that managers should have the discretion to respond to a wider set of human concerns. In other words, if managers are to serve shareholders' true interests, then they need to have wide latitude in mediating among a more complex set of values.[32]

B. The Trouble with Shareholder Conscience

At first it might seem appealing to grant managers wide discretion so that they can be responsive to shareholders' ethical commitments. Indeed, proponents of the shareholder-conscience model posit that, under ordinary corporate law, managers already have a free hand to mediate various claims based on moral values.[33] On this account, managers must simply realize that they are not legally bound to do the bidding of only the most profit-hungry investors.[34] With this proper understanding, managers can finally do what is best for real shareholders.[35]

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30. *See* 79 DEL. CODE ANN. tit. 8, §§ 361–368. *See generally* Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681 (2013) (discussing legal forms that might help social enterprise founders achieve their goals); Leo E. Strine, Jr., *Making It Easier for Directors to Do the Right Thing*, 4 HARV. BUS. L. REV. 235 (2014) (discussing the conditions under which Delaware's benefit corporation legislation can achieve its goals). For an argument that benefit corporation legislation may actually sharpen the focus on shareholder wealth in ordinary corporations, see James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 501 n.211 (2015).

31. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 98.

32. *See id.* at 9.

33. *See id.* at 26–31; *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 772–75 (2005) (discussing managerial discretion); M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company*: Everything Old Is New Again*, *in* CORPORATE LAW STORIES 37, 66, 75 (J. Mark Ramseyer ed., 2009) (same); Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 10–15 (2015) (same).

34. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 24–32.

35. In this Section, I focus on Professor Stout's argument that managers ought to vindicate the prosocial views of corporate shareholders. *See generally* STOUT, THE SHAREHOLDER VALUE MYTH, *supra* note 6. Professor Stout also coauthored pathbreaking work on the role of corporate stakeholders, *see, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999), but I bracket those arguments here and reserve discussion of stakeholder management for Part III of this Essay.

But there are several reasons to be skeptical of this account. To begin with, corporate law is only one of many constraints on managerial behavior, and often not the most powerful.[36] In addition to discipline imposed by product markets, capital markets, and the market for corporate control, there are also constraints that emerge from the internal politics of firms—that is, the power dynamics among various firm participants.[37] It is one thing to pronounce that managers, acting within the bounds of the business judgment rule, are legally free to negotiate these dynamics as they please.[38] It is quite another to say that the political conditions of modern firms will permit them to do so.

The shareholder-conscience model is certainly sensitive to these concerns.[39] Indeed, its most prominent advocate, writing alone and with others, has given a sophisticated account of firms' internal politics.[40] According to this account, managers must satisfy the minimum demands of all corporate contributors to assure that they will continue to participate in the firm's productive activities.[41] But beyond meeting these minimum demands, managers will respond to those participants who muster the strongest "political forces" in their own favor.[42] And so, whether managerial discretion translates into actual decisions in favor of shareholders' conscientious interests will turn on the political power of shareholders supporting those interests.

On that question of power, it seems unlikely that managerial discretion to serve shareholder conscience will amount to very much. One reason is that shareholders who prefer firms to focus on financial value have the advantage of homogeneity.[43] That is, shareholders who

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36. *See* Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Oliver D. Hart, *The Market Mechanism as an Incentive Scheme*, 14 BELL J. ECON. 366 (1983); Bengt Holmström, *Managerial Incentive Problems: A Dynamic Perspective*, 66 REV. ECON. STUD. 169 (1999); Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983).

37. *See* HENRY HANSMANN, OWNERSHIP OF ENTERPRISE (1996); Gabriel Rauterberg, *Contracting within the Firm* (Aug. 28, 2015) (unpublished manuscript) (on file with author).

38. For skepticism about this legal claim, see James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1595–1600.

39. *See, e.g.*, Blair & Stout, *supra* note 35.

40. *See, e.g.*, *id.* at 282–83, 323–28.

41. *See id.* at 325.

42. *Id.*

43. *See* Hansmann, *supra* note 37, at 62–65 (discussing advantages that accompany homogeneous interests); *see also* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 891–92 (2005) (discussing shareholder homogeneity); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 799–800 (2005) (discussing collective action problems faced by socially motivated investors); Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1449 (2006) (same).

see the firms in which they invest primarily or exclusively as vehicles to enhance their own wealth will not need to negotiate delicate matters of conscience before they can exert their combined influence within the firm. To put the point another way, this group of value-maximizing shareholders has a built-in political advantage due to the low cost of maintaining its internal lobbying coalition.[44] As a result, it is very hard for "conscience" investors to compete for management's attention.[45]

A proponent of the shareholder-conscience model might reply that all (or nearly all) actual shareholders have a conscience, and so firms are failing to deliver, even according to their own promises of shareholder value.[46] On this view, managers are burdened by inaccurate and unhelpful social messages—or "myths"—telling them that shareholders only value money.[47] And shareholders themselves are at least partly responsible by failing to see how their knee-jerk emphasis on financial return actually works against their own best interests.[48] If we could only dispel (or deflate) these myths, which infect both managerial and shareholder thinking, then we would be on the path toward *true* shareholder value.[49]

While it may be the case that most shareholders have a conscience, that proposition does not imply that most shareholders want the corporations in which they invest to advance their various ethical commitments. Take, for example, a firm in which the majority of shareholders care deeply about criminal justice reform. On the shareholder-conscience model, these socially conscious interests pass through seamlessly to corporate management, which should then act to integrate them into corporate conduct. But it is not at all clear that shareholders actually want corporations to reflect their values so seamlessly.

Instead, it is quite plausible to think that shareholders have preferences with regard to ultimate social *outcomes*, but a separate set

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44. For analogous arguments in the public choice literature, see, for example, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

45. Indeed, some proponents of investor activism on social matters seem to concede that significant legal reforms would be required to realize their goals. *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACCT. 247, 265–66 (2017) (suggesting reform of corporate voting to encourage ethical behavior).

46. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 106–07.

47. *See id.* On the role of myth in contemporary corporate law scholarship, see Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors: A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014).

48. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 106–07.

49. *See id.*

of preferences with regard to which *institutions* pursue those goals. That is, shareholders might very well endorse what has been called an "institutional division of moral labor."[50] Certain moral, social, or political goals—like reforming the criminal justice system—may be desired by most, or even all, of a firm's shareholders. But that does not mean that those same shareholders want the firms in which they invest to adopt these causes.

Indeed, there may be a number of different reasons why shareholders prefer this kind of institutional division. Some shareholders might think that business firms, and the managers who run them, are not particularly qualified or competent to implement corporate policy in service of broad notions of social justice.[51] Others might think that managers are competent to do so, but that they have a comparative advantage in working to increase firm value, and that they should accordingly allocate their scarce decisionmaking resources to focus on that narrower goal. Finally, a shareholder might favor a set of social or political projects, but also think that other institutions—like government or perhaps certain nonprofit organizations—might be more democratically representative or otherwise legitimate agents for pursuing those projects.[52] The point is not that all shareholders will agree with the institutional division of moral labor. Rather, the point is that it is not so easy to move directly from the proposition that shareholders have a deep and diverse set of values to the proposition that those shareholders want business firms to be the institutional agents attempting to vindicate those values.

Perhaps a proponent of the shareholder-conscience view would reply that the distinction between personal ethics and institutional decisionmakers leaves shareholders worse off.[53] That is, even if shareholders separate their personal beliefs from the conduct of

50. *See* JOSEPH HEATH, MORALITY, COMPETITION, AND THE FIRM: THE MARKET FAILURES APPROACH TO BUSINESS ETHICS 94 (2014); *see also* THOMAS NAGEL, EQUALITY AND PARTIALITY 53–56 (1991) (discussing the "moral division of labor"); JOHN RAWLS, POLITICAL LIBERALISM 284 (1993) (discussing the need for "an institutional division of labor . . . between the basic structure [of society] and the rules applying directly to particular transactions"); Jukka Makinen & Arno Kourula, *Pluralism in Political Corporate Social Responsibility*, 22 BUS. ETHICS Q. 649, 651–52 (2012) (discussing the division of moral labor); Jeff McMahan, *The Ethics of Killing in War*, 34 PHILOSOPHIA 23 (2006) (same); Samuel Scheffler & Véronique Munoz-Dardé, *The Division of Moral Labor*, 79 PROC. ARISTOTELIAN SOC'Y 229 (2005) (same).

51. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (1962) [hereinafter FRIEDMAN, CAPITALISM]; Milton Friedman, *The Social Responsibility of Business is To Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 [hereinafter Friedman, *Social Responsibility*].

52. *See* Waheed Hussain & Jeffrey Moriarty, *Accountable to Whom? Rethinking the Role of Corporations in Political CSR*, 149 J. BUS. ETHICS 519 (2016).

53. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 99–101.

corporate affairs, those shareholders are in fact operating under a debilitating ideology that works systematically against their interests.[54]

This reply has the flavor of a claim that shareholders are operating under some sort of "false consciousness," and that they would behave differently if only they could better appreciate their own situations.[55] But like other arguments from false consciousness, there are serious questions about who might have epistemic authority to know better than shareholders what is actually good for them. And if the answer is corporate managers, then we would need some account of how they are supposed to determine, and mediate among, the diverse and often irreconcilable conscientious commitments of shareholders.

If I am right that shareholders pressure managers to focus on their wealth, not because shareholders fail to see what is good for them, but instead because that is the vision they have for the firms in which they invest, then the shareholder-conscience view appears to run out of steam. That is, if a set of shareholders genuinely prefers to exercise conscience through other institutional vehicles, and that set is large or cohesive enough to exert its political power within the firm, then the shareholder-conscience argument seems to disappear. Managers may still have the discretion to promote shareholders' moral views, but those same managers will consistently respond to constituents that can exercise political power within the firm. And if it turns out that financially focused shareholders can form effective coalitions, then the shareholder-conscience model does not offer independent reasons, grounded in political morality, to reject any result.[56]

At this point, proponents of the shareholder-conscience model face a dilemma. On one hand, they can insist that the model is only meant to be descriptive of the way that things actually are in corporations. This account would say that shareholders are prosocial people with a diverse set of values other than their own material wealth, and that managers have a legal right to act in furtherance of those interests. If it turns out that managers do not act this way, then

54. *See id.* at 100–02.

55. Foundational work on the idea of "false consciousness" dates back to KARL MARX & FRIEDRICH ENGELS, THE GERMAN IDEOLOGY (1846). For a powerful critique of false consciousness and its historical uses, see GUENTER LEWY, FALSE CONSCIOUSNESS: AN ESSAY ON MYSTIFICATION (1982).

56. *See* David Millon, *New Game Plan or Business As Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1026 (2000) (arguing that the team-production model of corporate law operates according to internal power relations rather than moral principle); *see also* Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1234–35 (2002) (agreeing with Millon's assessment).

shareholder-conscience theorists can identify the mechanisms by which shareholders' personal values fail to translate to the corporation, but they can "remain agnostic" on questions of justice.[57] On the other hand, proponents of shareholder conscience might make a "normative turn" and argue that managers *should* use their discretion to promote a broader set of shareholder values.

If the shareholder-conscience model is merely descriptive, then it can only be judged on the accuracy of its factual claims. On that score, social science provides strong evidence of prosocial norms, but there is little evidence with regard to shareholders' preferences for the specific role of corporations in achieving a more just society. The actual behavior of investors in large public corporations, however, tends to show that they prefer corporations to stay in their rather narrow financial lane.[58] Now it might be that this behavior is the result of a collective action problem among conscientious investors who do not agree on specific moral goals and therefore have difficulty coalescing around a unified activist strategy toward management.[59] But it seems just as likely that this behavior reveals shareholder preferences for an institutional division between their conscientious commitments and the public corporations in which they invest.[60]

This conclusion seems to hold even for those who invest in SRIs. Proponents of the shareholder-conscience model are right to note that there has been a dramatic rise in the amount of money flowing through funds that integrate ethical, social, or environmental concerns. Yet SRI funds still make up only a small fraction of total funds invested in public companies.[61] And socially committed investors often have a difficult time discovering information that would be relevant to their morally

57. *See* Millon, *supra* note 56, at 1026 (stating that the team-production model of corporate law is "agnostic on the question of just deserts").

58. *See, e.g.*, *New Analysis: Mixed Results for 2015 Proxy Season on Social and Environmental Issues,* SUSTAINABLE INVS. INST. 2 (Aug. 19, 2015), http://siinstitute.org/press/2015/Si2_Press_Release_Proxy_Review__Aug__2015.pdf [https://perma.cc/Q6TR-FV44] (reporting that, in 2015, social and environmental shareholder proposals received an average of only twenty percent support); *cf.* STOUT, CULTIVATING CONSCIENCE, *supra* note 20, at 81–84 (acknowledging limitations of experimental evidence on prosocial behavior).

59. *See supra* notes 39–45 and accompanying text.

60. For a discussion of "socially responsible investment" and how it tends to resemble ordinary institutional investment, see Nelson, *supra* note 38, at 1590–91; and James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2014 n.236 (2016) [hereinafter Nelson, *Illusion of Symmetry*].

61. *See* Scott Hirst, *Social Responsibility Resolutions*, 42 J. CORP. L. 217, 220 (2018); *see also* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1437 (2008) ("SRI assets remain small relative to the enormity of U.S. capital markets.").

motivated investment objectives.[62] As a result, empirical evidence tends to suggest that the bulk of "socially responsible" investments—especially those that flow through professional money managers—are motivated more by a desire to manage risk in diversified portfolios than by a desire to promote prosocial goals.[63] In other words, it seems the better explanation for the newfound popularity of SRIs has more to do with overall financial performance than with conscience.[64]

The evidence concerning benefit corporations appears to point in the same direction. Again, proponents of shareholder conscience are right to note the remarkable popularity of these forms among state legislatures.[65] But that legislative popularity alone provides little support for proponents' preferred model of corporate conscience.

To begin with, it is important to note that this legislation creates an alternative organizational form for those who wish to integrate nonfinancial concerns into their ordinary business affairs.[66] Benefit corporation legislation enacts distinct legal rules—separate from the ones governing ordinary for-profit business firms—to govern businesses with hybrid missions. Commentators often gloss over this critical point in arguing that the rise in benefit corporation legislation shows that businesses need not be so financially focused.[67] Even Justice Alito seemed to be drawn to that conclusion in his opinion for the *Hobby Lobby* Court, pointing to benefit corporation legislation as evidence of the "inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals."[68] But establishing a separate organizational form—accompanied by an explicit disavowal of ordinary fiduciary duty standards for corporate managers—provides no support for reimagining the norms that govern firms organized as conventional for-profit businesses.

Indeed, the recent rise in benefit corporation legislation may actually serve to entrench shareholder primacy norms in ordinary

62. *See* Bruner, *supra* note 61, at 1438; Hirst, *supra* note 61, at 234–36.

63. *See, e.g.*, John R. Nofsinger, Johan Sulaeman & Abhishek Varma, Institutional Investors and Socially Responsible Investments: It Just Makes (Economic) Sense 4 (Wake Forest U., Working Paper, January 2016), http://capitalism.wfu.edu/wp-content/uploads/2016/04/Varma-paper.pdf [https://perma.cc/G9XY-3MJV] ("[A]ny tilt of institutional portfolios toward SRI is driven by economic incentives instead of social values.").

64. *See id.* at 34 ("[M]ost [SRIs are] actually being driven by economic incentives and risk management motives.").

65. *See supra* notes 27–31 and accompanying text.

66. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 361–368 (2018) (Delaware law pertaining to the establishment and governance of public benefit corporations).

67. *See, e.g.*, STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 98.

68. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

businesses. Proponents of the shareholder-conscience model argue that there is simply no legal reason why social entrepreneurs cannot pursue their prosocial agendas in traditional business firms.[69] But the push for alternative legal forms to accommodate hybrid businesses seems to belie that notion. For example, the leading advocates of benefit corporation legislation candidly acknowledge that ordinary corporate law is not hospitable to mission-driven entrepreneurs and investors. In fact, these advocates make that lack of hospitality a central feature of the case in favor of adopting an alternative statutory scheme for social enterprise.[70] It would seem, then, that the rising popularity of benefit corporations among state legislatures can be taken as a tacit acknowledgement that ordinary business corporations are not supposed to be primarily prosocial. Instead, this legislation may be better understood as a means to channel entrepreneurs with conscientious aspirations for their businesses into a more suitable legal form.[71]

Finally, one should not confuse the legislative popularity of hybrid forms—which is undeniable—with their popularity among entrepreneurs and investors. On this score, early returns suggest that very few businesses are actually making use of such forms.[72] Now this marginal use of hybrid forms may simply provide evidence that social entrepreneurs regard the standard corporate form as perfectly suitable for their prosocial objectives.[73] But it may also bolster the view that many conscientious shareholders endorse some version of the institutional division of moral labor.

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69. *See* STOUT, SHAREHOLDER VALUE MYTH, *supra* note 6, at 24–32; *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163 (2008) [hereinafter Stout, Dodge v. Ford].

70. *See, e.g.*, William H. Clark, Jr. & Larry Vranka, *White Paper: The Need and Rationale for the Benefit Corporation*, BENEFIT CORP. 7–14 (Jan. 18, 2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/X63A-EMKF] (arguing that "[e]xisting legal frameworks do not accommodate for-profit mission-driven companies").

71. *See, e.g.*, Leo E. Strine, Jr., *Making It Easier for Directors to Do the Right Thing*, 4 HARV. BUS. L. REV. 235, 248–253 (2014). *But see* Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 964 (2017) (noting that "benefit corporation statutes typically include a provision disclaiming any effect of benefit corporation statutes on the validity or interpretation of the for-profit corporate law outside the benefit corporation context"). I thank Dana Brakman Reiser for an exchange that helped me to develop this point.

72. *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 587 (2016) ("Currently, only a relatively small number of social enterprises have been formed . . . .").

73. *See* David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461 (2017) (arguing that benefit corporation legislation in Delaware should not be interpreted to exclude multistakeholder governance as a "menu option" under ordinary corporate law).

If the shareholder-conscience view is a normative model, rather than a descriptive one, then we need to dig a bit deeper to determine its moral grounding. The most plausible source of that moral grounding would seem broadly utilitarian. We should grant directors wide latitude to respond to shareholders' true interests, on this view, because that latitude would promote overall shareholder welfare. A narrow focus on financial value not only ignores shareholders' other-regarding preferences, it also destroys firm value itself. But if managers are insulated from the relentless pressure to increase quarterly profits, the idea is that they can promote the long-term interests of the firm.[74]

This normative model escapes some of my earlier criticisms, but it runs into serious difficulties of its own. The most significant is that it seems to conflate the problem of short-termism with the question of whether managers should promote the financial value of the firm.[75] The worry about short-termism is that managers will make decisions that may induce an immediate spike in share price but will ultimately reduce the value of the firm in the long term.[76] Although there is robust debate about whether short-termism is really a problem,[77] that debate is not concerned with whether managers are supposed to act in shareholders' financial interests in the first place. Instead, participants in the short-termism debate tend to assume that managers should act to maximize the present value of firms' future cash flows and simply

74. *See, e.g.*, Lynn A. Stout, *New Thinking on "Shareholder Primacy,"* 2 ACCT., ECON. & L. 1, 18 (2012); *see also* Laurence D. Fink, *Annual Letter to CEOs: A Sense of Purpose* (Jan. 12, 2018), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/B93N-3U2R] ("To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.").

75. *See* Stout, *supra* note 74, at 18.

76. *See* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1952 (2017) [hereinafter Strine, *Who Bleeds When the Wolves Bite?*].

77. *Compare* Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015), Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013), *and* Mark J. Roe, *Corporate Short-Termism in the Boardroom and in the Courtroom*, 68 BUS. LAW. 977 (2013), *with* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545 (2016), Yvan Allaire & François Dauphin, *"Activist" Hedge Funds: Creators of Lasting Wealth? What Do the Empirical Studies Really Say?*, INST. FOR GOVERNANCE PRIV. & PUB. ORGS. (July 2014), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2460920 [https://perma.cc/C4WM-M7KY], Martin Lipton, *The Bebchuk Syllogism*, HARV. L. SCH. F. (Aug. 26, 2013), https://corpgov.law.harvard.edu/2013/08/26/the-bebchuk-syllogism/ [https://perma.cc/M7VM-WML9] [hereinafter Lipton, *Bebchuk Syllogism*], *and* Marty Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, WORLD ECON. F. (Sept. 2, 2016), http://www.wlrk.com/docs/thenewparadigm.pdf [https://perma.cc/B9BH-WAZP] [hereinafter Lipton, *New Paradigm*].

disagree about whether there are structural impediments to achieving that goal.[78]

Seen from this angle, it is not clear that the shareholder-conscience model is really any different from the traditional view that managers should promote long-term shareholder value.[79] It is true that the model might offer different strategic advice about how best to achieve that goal.[80] But even Milton Friedman—the most prominent foil for shareholder-conscience theorists—endorsed the use of "social conscience" in strategic service of firm profitability.[81] In the end, then, the normative model of shareholder conscience—much like its descriptive counterpart—poses no real challenge to the status quo.

II. MANAGERS

Rather than looking to shareholders as the source of corporate conscience, this Part investigates the claim that we should focus instead on corporate managers. In doing so, it identifies two main problems with the leading account of managerial conscience: misalignment with shareholders' interests and imposition on corporate employees. This dual critique calls into question the legitimacy of using corporate authority to promote managers' own conscientious interests and thereby supplies reasons to reject the managerial view of corporate conscience.

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78. *See, e.g.*, Bebchuk et al., *supra* note 77; Lipton, *Bebchuk Syllogism*, *supra* note 77. For example, participants in this debate disagree about whether investors with different time horizons can push managers to make decisions that will produce a short-term spike in share price, but that will ultimately decrease corporate value in the long term. *Compare* Bebchuk et al., *supra* note 77, at 1117–35, *with* Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 8–11 (2010). For one recent attempt to bring clarity to this debate, see David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

79. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015).

80. *See* Fink, *supra* note 74; *see also* Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, DEALBOOK (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html [https://perma.cc/PN6D-U6DE] (noting Fink's belief that "having social purpose is inextricably linked to a company's ability to maintain its profits").

81. Friedman, *Social Responsibility*, *supra* note 51; *see also* Joseph Heath, Jeffrey Moriarty & Wayne Norman, *Business Ethics and (or as) Political Philosophy*, 20 BUS. ETHICS Q. 427, 443 (2010) (noting that Friedman's work "has served as a foil for a strikingly large proportion of theorizing in business ethics").

A. Moralizing Managers

The leading view of managerial conscience holds that corporate managers should rely on their own deepest moral commitments—especially their religious beliefs—in making business decisions.[82] On this account, business decisions are invariably moral decisions, and so managers need a rich source of moral authority to guide them.[83] Managers' own religious beliefs, in turn, provide them with an excellent vocabulary or "grammar" for negotiating pervasive ethical dilemmas in the business world.[84]

One way that managers' religious beliefs might be operationalized—or "translated"—into business is through their fiduciary duties.[85] Among these fiduciary duties, corporate managers have a fundamental obligation to act in "good faith."[86] This obligation has been the subject of considerable scholarly debate,[87] with one prominent commentator arguing that the duty of good faith should be interpreted in light of religious teachings.[88] On this view, religious managers should use the duty of good faith as a "linguistic entry point" for incorporating their own religious beliefs and traditions into their business decisions.[89] In doing so, managers should be vocal about their

82. *See, e.g.*, Johnson, *Faithfulness*, *supra* note 7, at 40; Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers about Corporate Purpose* 29, 32 (U. St. Thomas, Working Paper No. 08-22, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260979 [https://perma.cc/6S7V-BP34] [hereinafter Johnson, *Law and Lawyers*]; *see also* ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 179–205 (2010); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013); Susan J. Stabile, *Using Religion To Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839 (2004). This Section addresses the leading view of managerial conscience, which focuses on religion. Many of my criticisms in Section II.B, however, apply equally to nonreligious "comprehensive" conceptions of the good. *See* Rawls, *supra* note 50, at 13 (distinguishing between "political" and "comprehensive" doctrines).

83. *See* Johnson, *Re-Enchanting*, *supra* note 6, at 91; *see also* Johnson, *Faithfulness*, *supra* note 7, at 3.

84. *See* Johnson, *Faithfulness*, *supra* note 7, at 5, 44.

85. *See* Johnson, *Law and Lawyers*, *supra* note 82, at 30, 31.

86. *See In re* Walt Disney Co. Derivative Litigation, 907 A.2d 693, 753 (Del. Ch. 2005).

87. *See, e.g.*, Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559 (2008); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006); Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769 (2007).

88. *See* Johnson, *Law and Lawyers*, *supra* note 82, at 31, 34; *see also* Johnson, *Faithfulness*, *supra* note 7, at 5.

89. Johnson, *Faithfulness*, *supra* note 7, at 25; *see also* Johnson, *Law and Lawyers*, *supra* note 82, at 28; Johnson, *Re-Enchanting*, *supra* note 6, at 97 (citing Robert K. Vischer, *The Morally Distinct Corporation: Reclaiming the Relational Dimension of Conscience*, 5 J. CATH. SOC. THOUGHT 323 (2008)).

religious motivations and proudly invoke them as reasons for shaping corporate policy and particular courses of corporate action.[90]

Proponents of moralized management recognize that most corporations are not run on their preferred model.[91] Indeed, they tend to see the separation of deep convictions and business practice as a regrettable feature of the modern corporate landscape.[92] In their view, advocates of the law and economics approach to corporate law—along with their unrealistic assumptions of rational self-interest among market participants—have crowded out those who might wish to bring a more profound sense of purpose to business affairs.[93] And so, proponents of this model seek to "de-secularize" the corporate world—to bring the richness of religious perspective to the amoral world of corporate management.[94]

To support their case, advocates of moralized management offer a number of arguments in its favor. The first focuses on benefits for religious individuals. The basic claim here is that it is unfair to expect deeply religious people to leave their convictions at home when they come to work. Religion is often at the core of people's identities, and, on this view, it cannot be partitioned or compartmentalized so as to keep it out of the business world. To demand that religious people deny their full selves in the workplace would strip them of the opportunity to live coherent lives.[95] And given that Americans spend more and more of their time at the office, they should be free to integrate their faith into daily work.[96]

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90. *See* Johnson, *Law and Lawyers*, *supra* note 82, at 30–31; *see also* Johnson, *Faithfulness*, *supra* note 7, at 17.

91. *See* Johnson, *Faithfulness*, *supra* note 7, at 34 (arguing that norms of self-interest dominate current corporate practice); *cf.* Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015) (discussing businesses that are run according to religious principles); Alan J. Meese & Nathan B. Oman, Hobby Lobby*, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014) (same).

92. *See* Johnson, *Faithfulness*, *supra* note 7, at 4.

93. *See id.* at 31; Johnson, *Re-Enchanting*, *supra* note 6, at 90; Stabile, *supra* note 82, at 856, 884.

94. *See, e.g.*, Johnson, *Faithfulness*, *supra* note 7, at 6 (discussing the benefits of "de-secularizing corporate discourse").

95. *See id.* at 35, 36; Vischer, *supra* note 82, at 202; *see also* Colombo, *supra* note 82, at 19; Johnson, *Law and Lawyers*, *supra* note 82, at 31, 32; Lyman Johnson, *Reclaiming an Ethic of Corporate Responsibility*, 70 GEO. WASH. L. REV. 957, 962 (2002) [hereinafter Johnson, *Reclaiming an Ethic*]; Johnson, *Re-Enchanting*, *supra* note 6, at 83.

96. *See* Colombo, *supra* note 82, at 87; *see also* DAVID W. MILLER, GOD AT WORK: THE HISTORY AND PROMISE OF THE FAITH AT WORK MOVEMENT 125–53 (2007).

A second argument for moralized management appeals to the benefits of pluralism.[97] The idea here is that we should want to move toward a corporate system in which individual businesses are less homogeneous. Proponents of moralized management tend to think that the modern business world is rather monolithic—that the norms of profit maximization dominate the hearts and minds of most participants, even those who might otherwise bring diverse ethical perspectives.[98] But if we encourage corporate managers to infuse their own consciences into the businesses they run, then many different corporate stakeholders can associate with those firms in an effort to live out their deepest commitments.[99] Just as having a diverse group of voluntary associations provides the benefits of pluralism in civil society, so, too, might religiously infused businesses better mirror society as a whole and enrich our communal lives.[100]

A third argument for moralized management is that infusing religion into business has the potential to achieve a variety of socially responsible objectives.[101] These objectives could include protection of the environment, support for local communities, choosing ethically minded suppliers, or fair treatment of corporate employees.[102] Where previous arguments for corporate social responsibility have fallen short, religious arguments and beliefs might be able to supply the missing normative foundation.[103]

A final argument for moralized management is that it might help religion itself. On this view, if we encourage more people to be vocal about their religious views in the workplace, then we might begin to break down the barriers to faith-based conversation in public life.[104] For example, one commentator argues that we have become "skittish" about offering religious arguments to our fellow citizens, which has impoverished public discourse.[105] Others contend that religious viewpoints are unfairly excluded from our public conversations, denying religious citizens their right to participate in democracy on

97. *See* Johnson, *Faithfulness*, *supra* note 7, at 37.

98. *See* Vischer, *supra* note 82, at 195–96 (discussing the disconnect between former Enron CEO Ken Lay's personal religious beliefs and Enron's culture of profit maximization).

99. *See id.* at 179–205; Johnson, *Faithfulness*, *supra* note 7, at 38.

100. *See* Johnson, *Faithfulness*, *supra* note 7, at 6.

101. *See* Johnson, *Re-Enchanting*, *supra* note 6, at 102–03.

102. *See* Stabile, *supra* note 82, at 842.

103. *See* Johnson, *Faithfulness*, *supra* note 7, at 6; Stabile, *supra* note 82, at 873.

104. *See* Johnson, *Faithfulness*, *supra* note 7, at 31, 45.

105. Johnson, *Re-Enchanting*, *supra* note 6, at 102.

equal terms.[106] In any event, if we encourage religious people to manage businesses in accord with their faith, then perhaps that ethic will spill over into broader domains of democratic deliberation.

B. The Trouble with Managerial Conscience

At the outset, the case for moralizing managers would seem to run directly into a classic problem in corporate law and policy: agency costs. Agency costs result from the misalignment of interests between shareholders and managers,[107] and are often thought to be the "master problem" of corporate law.[108] If corporate managers are supposed to make business decisions in accord with their own deepest moral and religious beliefs, this problem of misalignment is likely to be quite significant.

To see why, it is important to recall that most shareholders invest in corporations to build wealth for things like retirement or their children's education.[109] To achieve these goals, ordinary investors overwhelmingly put their money in diversified investment vehicles, including mutual funds and pension funds.[110] The result is that most public equity in the United States is currently held by institutional investors specializing in management of diversified investment portfolios.[111]

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106. *See, e.g.*, STEPHEN CARTER, THE CULTURE OF DISBELIEF 3–101 (1993); CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTIONS IN LIBERAL POLITICS 109–51 (2002); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 43–61 (1999); Michael McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90–110 (Nancy Rosenblum ed., 2000); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 3 UTAH L. REV. 639 (1999).

107. For foundational work on agency-cost analysis, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

108. Roberta Romano, *Metapolitics and Corporate Law Reform,* 36 STAN. L. REV. 923, 929 (1984).

109. *See* Strine, *Who Bleeds When the Wolves Bite?*, *supra* note 76, at 1874, 1882; *see also* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 451 (2014) [hereinafter Strine, *Ordinary Investors*].

110. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013) (describing the structure of modern capital markets); Nelson, *Illusion of Symmetry*, *supra* note 60 (same).

111. *See* Gilson & Gordon, *supra* note 110, at 864–65; Nelson, *Illusion of Symmetry*, *supra* note 60, at 2011 n.218.

As a consequence of tax policy, moreover, ordinary investors' funds tend to be committed to the stock market for the long term.[112] Given this long-term orientation, most beneficial owners of corporate stock are interested in the reliable financial growth of their investment portfolios.[113] Indeed, as a result of current practices with regard to retirement savings, many individuals are now highly dependent on these financial returns.[114]

But the goal of long-term wealth creation for ordinary investors appears to be at odds with the argument for moralized management. Moralized managers are supposed to be motivated not merely by the financial interests of investors, but rather by their own deepest spiritual commitments. That is, moralized management is supposed to transcend money by taking focus away from "unbridled" profit seeking[115] and turning it toward a higher set of moral ends. The priority of financial gain, on this view, is regrettable[116] and requires a search for deeper sources of moral authority to overcome the "hegemony" of money.[117] The result of this view, then, would seem to be a serious misalignment between moralized managers and ordinary corporate investors.

Given this pronounced misalignment, shareholders seeking to grow their money for retirement or for funding their children's education would seem to have a strong objection to moralized management. To be sure, managers have a real interest in maintaining their own moral and religious identities. But they have a much weaker claim to do so with shareholders' money. And while shareholders are not without their own deep commitments,[118] by and large they do not invest their money in corporations so that managers can keep themselves morally and religiously pure. Instead, most shareholders want their money to grow in a reliable and durable fashion.[119]

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112. *See* Strine, *Who Bleeds When the Wolves Bite?*, *supra* note 76, at 1878–79; *see also* Leo E. Strine, Jr., *Corporate Power Ratchet: The Court's Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations,* 51 HARV. C.R.-C.L. L. REV. 423, 444 (2016) [hereinafter Strine, *Power Ratchet*].

113. Strine, *Who Bleeds When the Wolves Bite?*, *supra* note 76, at 1882, 1884.

114. *See id.* at 1880.

115. *See* Johnson, *Re-Enchanting*, *supra* note 6, at 95.

116. *See id.* at 84.

117. *See* Johnson, *Faithfulness*, *supra* note 7, at 31 (arguing that discourse in corporate law and theory has been demoralized "largely due to the hegemony of finance language").

118. *See supra* notes 46–56 and accompanying text.

119. *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1440 (2006); Strine, *Who Bleeds When the Wolves Bite?*, *supra* note 76.

The frequency of divergence between the interests of moralizing managers and ordinary shareholders, then, would make moralizing managers a major source of agency costs. Under the traditional model of corporate law and governance, according to which managers pursue shareholder wealth, there is typically little reason to worry about serious and systematic misalignment with shareholder interests. But the moralized-management view turns those assumptions on their head, which ought to result in heightened worries about managers' use of shareholder money.[120]

One way to respond to this concern about agency costs is to claim that the shareholder franchise confers legitimacy on moralizing managers. In the usual course of business, moralizing managers may be viewed as unfaithful agents if they pursue their own conception of the good against shareholders' wishes. But given that shareholders are free to kick managers out of office, their failure to do so would indicate that moralizing managers are indeed acting in shareholders' best interests, even if those interests are nonfinancial. In other words, moralizing managers are not properly viewed as a source of agency costs when shareholders tacitly endorse their moral goals.[121]

But there are a few ways in which this response is unsatisfying. To begin with, the shareholder franchise plays a very limited role in corporate governance generally.[122] Corporate elections are typically uncontested, which means that shareholders have no real choice among candidates.[123] Shareholders may choose to withhold their votes for particular nominees, but the default rule in corporate law is that director elections are governed by simple plurality voting.[124] Shareholders dissatisfied with management's nominees may wish to

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120. For an analogous argument regarding corporate political spending, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013). On the idea that religious management is "on-the-job consumption," see Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 J.L. & ECON. 375, 382 (1983).

121. *See* Alan Meese, *Hobby Lobby and Corporate Social Responsibility: A View from the Right*, THE CONGLOMERATE (July 16, 2014), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1327&context=popular_media [https://perma.cc/TM5C-48MM] (arguing that shareholders are perfectly free to opt out of the default rule of profit maximization and allow managers to pursue religious objectives); *see also* Meese & Oman, *supra* note 91 (same). For the argument that tacit consent validates religious exemption claims, see Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539 (2015).

122. *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 130 (2009).

123. *See* Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1399 (2006).

124. *See, e.g.*, DEL. CODE ANN. tit. 8, § 216(3). All other matters in which the shareholders are entitled to vote are governed by majority voting. *See, e.g.*, *id.* § 216(2).

run their own slate of candidates, but they do not typically have access to the corporate proxy to facilitate their efforts.[125] Under these circumstances, a select group of powerful shareholders may wish to launch proxy contests, but the expenses of doing so are often prohibitive.[126] And even when they are not, shareholder votes bundle together a variety of issues on which shareholders may have views, which means that those votes cannot send a clear signal on any particular issue.[127] Shareholders can make their voices heard on specific issues under the so-called "town-meeting rule," which allows them to include proposals in company proxy materials.[128] But these proposals are supposed to be cast in precatory language and are generally nonbinding.[129]

Given these limitations, commentators have observed that the shareholder franchise is best seen as a rather blunt tool to prevent gross deviations from shareholder value in contexts particularly ripe for self-dealing.[130] In other words, shareholder voting is a means of "error correction," not ongoing governance. When managers substantially frustrate shareholders' financial expectations, those shareholders can step in and right the ship.[131] But corporate voting is not an effective means of aggregating shareholder preferences with regard to religious, moral, or philosophical issues.[132]

This observation about the shareholder franchise is especially important given the structure of modern capital markets. The vast majority of public company shares are now held by institutional investors, including pension funds and mutual funds, which exercise voting power on behalf of beneficial owners.[133] This institutional intermediation—or the "separation of ownership from ownership"[134]—

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125. *See* Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 758 (2013); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 677 (2016).

126. *See* WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 173–77 (5th ed. 2016); Rodrigues, *supra* note 123, at 1399.

127. *See* Bebchuk, *supra* note 43, at 857.

128. *See* 17 C.F.R. § 240.14a-8. (2018).

129. *See* ALLEN & KRAAKMAN, *supra* note 126, at 208; Pollman; *supra* note 125, at 677.

130. *See* Thompson & Edelman, *supra* note 122, at 138; Rodrigues, *supra* note 123, at 1399.

131. *See* Thompson & Edelman, *supra* note 122, at 151.

132. *See* Pollman, *supra* note 125, at 676 (arguing that "the shareholder franchise is not a device to aggregate the political, social, or religious values of shareholders . . . .").

133. *See* Nelson, *Illusion of Symmetry*, *supra* note 60, at 2011–16 (2016) (describing pervasive intermediation in modern capital markets).

134. Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1828 (2011); Leo E. Strine, Jr., *Toward Common Sense and*

further hinders moral preference aggregation though the shareholder franchise.[135] That is, capital market intermediation places an additional layer between shareholders' consciences and the corporate ballot box, which tends to filter out nonfinancial preferences.[136] The rise of institutional investors may encourage passive investment by making low-cost diversification widely available, but it does not facilitate moralized use of the shareholder franchise.[137] We should therefore resist the idea that the shareholder vote functions as a generally available legitimizing mechanism for moralized management.[138]

At this point, a proponent of moralized management might take issue with the emphasis on agency costs in the first place. Although agency-cost analysis has dominated corporate law scholarship for decades, some commentators think that it is overdone.[139] Instead of focusing so much on what distant and largely "absent" shareholders want,[140] the idea here is that we should focus more on the interests of other members of the "corporate group."[141] Although dispersed and diversified modern shareholders might be pathologically focused on corporate profits, other members of the corporate group—those with a

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Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance, 33 J. CORP. L. 1, 6 (2007).

135. *See* Pollman, *supra* note 125, at 674, 677.

136. *See* Nelson, *Illusion of Symmetry*, *supra* note 60, at 2010–16 (discussing the attenuation of shareholder-conscience claims in modern public corporations).

137. *See* Pollman, *supra* note 125, at 679. Things appear to be different in the context of close corporations. When ownership and control are united, it becomes plausible to think that the shareholder franchise effectively aggregates investor preferences. *See* Thompson & Edelman, *supra* note 122, at 151; Rodrigues, *supra* note 123, at 1399 n.50. Under these circumstances, shareholder voting may alleviate worries about agency costs that accompany moralized management. *See* Meese & Oman, *supra* note 91, at 282–83. But in firms characterized by the separation of ownership and control, shareholder voting is unlikely to have a similar kind of cleansing effect. Yet many proponents of moralized management do not limit their proposals to close corporations. *See, e.g.*, Johnson & Millon, *supra* note 33, at 26 (arguing that claims to religious exemptions should not be limited to closely held corporations); Lyman Johnson et al., *Comments on the HHS' Flawed Post-*Hobby Lobby *Rules* 3 (Hofstra Law Legal Studies Research Paper Series, Research Paper No. 2014-23) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512860 [https://perma.cc/SRV5-QSLV] (same).

138. *See* Thompson & Edelman, *supra* note 122, at 138 ("Thus the vote by shareholders exhibits less of the legitimizing function in the selection of directors than one sees in a political election of a representative, and more of the error-correcting purpose as to directors' behavior."); *see also* Rodrigues, *supra* note 123, at 1390 (arguing that the shareholder franchise does not serve the same legitimizing function as citizens' votes).

139. *See, e.g.*, Johnson, *Reclaiming an Ethic*, *supra* note 95, at 958; *see also* Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 741–48 (2017); *cf.* Joseph Heath, *The Uses and Abuses of Agency Theory*, 19 BUS. ETHICS Q. 497 (2009) (providing a "qualified defense" of agency theory).

140. Johnson, *Reclaiming an Ethic*, *supra* note 95, at 958.

141. *Id.*

much closer connection to actual business operations—might benefit from more spiritually rich management.[142]

The most obvious candidates for these spiritual benefits within the corporate group would seem to be those who work for the corporation—that is, corporate employees. Although employees are often omitted from discussions of corporate governance, progressive corporate lawyers have long argued that this omission is mistaken,[143] and prominent scholars continue to advocate for more attention to employees in corporate law.[144]

With regard to corporate employees, proponents of moralized management are right to focus on the value of religious accommodation in the workplace. Indeed, employees spend much of their lives at work, and it would be unfair to demand that they leave all traces of their religious identities at the office door. If religious convictions had to be expunged from the marketplace entirely, many people would be forced to pay a high price in order to participate in economic life.[145]

But there is a significant difference between accommodating the religious beliefs of ordinary employees and managing a corporation in accord with particular religious principles. Modern business corporations—particularly large businesses—are made up of people with a diverse array of beliefs, projects, and commitments. When these diverse employees seek accommodations for their religious beliefs or practices, they are seeking relief from the use of corporate authority over their conduct. But when managers attempt to infuse religion into corporate decisionmaking, they seek to harness that same corporate authority to *impose* their beliefs. This use of hierarchical authority—the "fiat" of corporate management[146]—transforms the moral character of managers' claims for religious liberty. Religious accommodation in

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142. *See* Johnson, *Re-Enchanting*, *supra* note 6, at 105.

143. *See, e.g.*, Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); Marleen A. O'Connor, *Human Capital ERA: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).

144. *See, e.g.*, Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L. J. 819, 836 (2017) ("American organizational law—particularly corporate law—has failed to appreciate the extent to which employees participate in the life of the firm."); Bodie, *supra* note 139, at 760 (arguing that "the fate of employees should be of particular concern to progressives' hearts").

145. For a forceful argument to this effect, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 872–74.

146. *See* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 552–59 (2002); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1697 (2001); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 114 (1971).

the workplace is undoubtedly important, but it does not entitle corporate managers to leverage corporate power to impose their own religious beliefs.[147]

Proponents of moralized management might reply that this concern for ordinary employees gives short shrift to managers' interests in freely exercising their consciences. On this view, concerns about accommodation in the workplace cannot be limited to lower levels of the corporate hierarchy. Managers are people, too, and their religious beliefs should be taken just as seriously as the beliefs of those whom they manage.

It is certainly true that managers have significant interests in exercising their own religion. But if corporate managers run businesses on particular religious principles, it is hard to imagine that employees will not feel pressure to conform.[148] The moralized-management view counsels senior managers to infuse religion into their business decisions. Moreover, it urges managers to be candid about doing so.[149] Under these conditions, employees will surely get the message that religion is driving business decisions. Responsible managers may try to dispel the notion that employee devotion will be rewarded—or a lack thereof punished—but employees concerned about their jobs or career advancement will likely feel considerable pressure to stay on management's good side. Moralizing managers, then, would put nonadherents in a very precarious position.[150]

A proponent of moralized management might then reply that employees can simply change jobs if they do not subscribe to a corporate manager's particular religious beliefs. That is, exit is a viable option for employees who are dissatisfied with their employers' religious

147. *See* James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. (forthcoming 2019).

148. *See* [1 Free Exercise and Fairness] KENT GREENAWALT, RELIGION AND THE CONSTITUTION 330 (2006) ("When employers base decisions on religious criteria, workers are thereby made susceptible to a particular form of outside pressure in deciding what religion, if any, to practice.").

149. *See* Johnson, *Faithfulness*, *supra* note 7, at 41; Johnson, *Re-Enchanting*, *supra* note 6, at 102.

150. *See* GREENAWALT, *supra* note 148, at 338 (arguing that maintaining unfavorable conditions of employment for nonadherents discriminates against them). Harms to employees become even more concrete and severe when managers claim religious exemptions from general laws that protect corporate employees. *See* Nelson Tebbe, Richard Schragger & Micah Schwartzman, Hobby Lobby*'s Bitter Anniversary*, BALKINIZATION (Jun. 30, 2015), https://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html [https://perma.cc/PV8G-TZXB] (disputing Justice Alito's claim in *Burwell v. Hobby Lobby* that a religious exemption from the contraceptive mandate would have "precisely zero" effect on Hobby Lobby's female employees, 134 S. Ct. 2751, 2760 (2014)).

management. Rather than insisting that certain managers change their practices, corporate employees are free to "vote with their feet."[151]

Although exit may be possible in theory, leaving a job involves prohibitive costs for many employees. To begin with, exit is often expensive because employees tend to make significant firm-specific investments that cannot easily be transferred to a different employer.[152] Moreover, even putting aside firm-specific investments, the practical mechanics of job change involve considerable transition costs. These costs include time and effort spent searching for suitable new employment,[153] difficulties in finding another job that calls for similar skills and experience,[154] and the increasing likelihood that a replacement job would involve a pay cut.[155]

In addition to its high cost, exit may not always sufficiently address employees' concerns with moralizing managers. Currently, most companies do not infuse religious beliefs into their ordinary management practices. But on the moralizing-manager view, the business world may look very different. If most Americans—including most corporate managers—are religious people, and if managers are supposed to manage corporations in accord with their religious beliefs, then there is no guarantee that employee exit from one job will ensure new employment in a religiously neutral environment.[156]

These factors combine to emphasize the familiar point that labor is less mobile—or less "liquid"—than capital.[157] This feature of the labor market, in turn, puts employees at a significant disadvantage in competing for power within modern firms.[158] Managerial power over employees is not necessarily a bad thing. Indeed, the fiat element of corporate hierarchy is often central to the efficiency properties of firm management.[159] But that same power provides reason to be skeptical of

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151. *See* H. Spencer Banzhaf & Randall P. Walsh, *Do People Vote with Their Feet? An Empirical Test of Tiebout's Mechanism*, 98 AM. ECON. REV. 843 (2008); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

152. *See* Nien-hê Hsieh, *Rawlsian Justice and Workplace Republicanism*, 31 SOC. THEORY & PRAC. 115, 128 (2005) [hereinafter Hsieh, *Rawlsian Justice*]; Nien-hê Hsieh, *Justice in Production*, 16 J. POL. PHIL. 72, 89 (2008) [hereinafter Hsieh, *Justice in Production*].

153. *See* Hsieh, *Rawlsian Justice*, *supra* note 152, at 129.

154. *See* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 101 (2015).

155. *See id.* at 102 (describing the current trend toward creation of lower-paying jobs).

156. *Cf. id.* at 103–04 (discussing several large firms with religious missions).

157. *See* Sandrine Blanc, *Expanding Workers' 'Moral Space': A Liberal Critique of Corporate Capitalism*, 120 J. BUS. ETHICS 473, 478 (2014); Greenfield, *supra* note 143, at 302, 323.

158. *See* Blair & Stout, *supra* note 35, at 326–27 (describing factors related to the decline in employee bargaining power within firms).

159. *See* Coase, *supra* note 146.

the idea that employee exit can solve problems of moralized management.

A proponent of moralized management might respond to this analysis with assurances that manager religion need not be sectarian.[160] Instead, managers who seek to infuse religion into their business decisions can take an ecumenical approach, perhaps applying principles common to the world's major religious traditions.[161] If managers opt for this more inclusive stance, then concerns about religious division might seem less pressing.

Although the ecumenical approach might help to relieve some worries about the moralizing manager, it does not answer the main challenges. To begin with, it fails to account for those employees who do not subscribe to the world's "major religions."[162] In the modern workplace, where many people come together for the purpose of making a living, there are sure to be employees who feel ostracized and excluded, even if managers are willing to take a wide view of what religious faith requires.

On the flip side, this ecumenical approach would seem to undermine the primary benefit of moralized management, namely, allowing deeply religious managers to live out their faith in administering business affairs. Some religious managers may hold ecumenical views, but many others adopt more stringent positions. For these managers, allowing an inclusive approach to religious management will be of little value. In fact, it may even encourage them to water down their religious beliefs in an effort to meet the model's standards of inclusiveness. The ecumenical approach, then, cannot save moralized management from problems of divisiveness and exclusion.

Having identified accommodation as the strongest argument in favor of moralized management and shown that it would come at unacceptable costs, the remaining strands of the argument are easy to reject. First, with regard to the purported benefits of "pluralism," we have already seen that proponents of moralized management seem to have things backwards. To be sure, pluralism is an important feature of the modern workplace. It is a site where people of all faiths and backgrounds get together and cooperate in producing valuable goods

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160. *See, e.g.*, Stabile, *supra* note 82, at 896–97, 900.

161. *See id.* at 900.

162. *See America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ [https://perma.cc/48YU-7VEP] (providing statistics on rising religious diversity in America).

and services.[163] Moralizing managers would bolster pluralism on an institutional level, with different businesses following their managers' different conceptions of the good. But this kind of pluralism threatens to exclude nonadherents within each of these businesses.[164] Unless we are willing to make unrealistic assumptions about workers' ability to sort themselves religiously among businesses—assumptions that employment law steadfastly refuses to make[165]—then "pluralism" becomes a reason to reject moralized management rather than a reason to support it.

One response to this line of argument might be that it depends on accepting the marketplace as it currently stands, and thereby threatens to ossify an undesirable state of affairs. That is, one reason that employment law rejects religious sorting among businesses is that antidiscrimination laws have made institutional pluralism impossible. If we follow proponents of moralized management, the marketplace might be populated with all kinds of religious companies. Under these alternative conditions, in which employees could pick and choose among employers that reflect their religious sensibilities, perhaps we would be less concerned about religious discrimination in any particular firm.[166]

It may be true that institutional pluralism, combined with smooth labor markets, would ease our worries about religious discrimination in the workplace. But the variety of people's religious beliefs and experiences is vast,[167] and it seems highly unlikely that there would be sufficient demand for corporations that satisfy all of this variety. Perhaps more fundamentally, the assumption of smooth labor

163. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003); Elizabeth Sepper, *Healthcare Exemptions and the Future of Corporate Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 305, 317 (Chad Flanders, Zoe Robinson & Micah Schwartzman eds., 2015).

164. *See* Blanc, *supra* note 157, at 484–85 (distinguishing between pluralism "across" corporations and pluralism "in" corporations).

165. *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 621 (9th Cir. 1988) ("Where the practices of employer and employee conflict . . . it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."); Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 141 (5th Cir. 1975) (explaining that Title VII provides "a means to preserve religious diversity from forced religious conformity"); McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) ("In a pluralistic and democratic society, government has a responsibility to insure that all its citizens have an equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs . . . ."); *see also* Nelson, *supra* note 147 (describing this case law in detail).

166. I thank Teddy Rave for raising this objection.

167. For foundational work on this topic, see WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE (1902).

markets is simply not in accord with modern reality. And so, in the real world, we are left with pervasive religious diversity in the workplace, and we need to work out principles that address this modern condition.[168]

As for the claim that religious management would promote corporate social responsibility, there are a few reasons to be skeptical. First, the empirical basis for this claim is highly speculative at best. It seems to simply assume that actively religious managers will behave more ethically than nonreligious managers and indeed more ethically than religious managers who keep their faith private. Any evidence supporting this assumption is anecdotal or counterfactual[169] and does not provide a sound basis to support claims made for moralized management.

Second, proponents of moralized management assume that religious convictions will consistently supplement public norms.[170] That is, they seem to think that the law can only go so far in encouraging ethical behavior, but religious managers can augment public policy by voluntarily submitting to more stringent ethical standards.[171] Yet religious convictions and public norms are not always fellow travelers. Indeed, when religious managers claim exemptions from general laws based on religious liberty protections, they are making a direct claim that their religious commitments are at odds with public norms.[172] Some religious managers may support social causes like environmental protection or workplace safety. But religious beliefs cut in the opposite direction on a significant number of issues.[173]

Finally, the argument for moralizing managers cannot be saved by the claim that it would be good for religion itself. It might be true that if we encouraged religious managers to be more vocal about their beliefs in the workplace, then they would be emboldened to be more

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168. For recent work on the distinction between ideal and nonideal theory, see A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFF. 5 (2010). For important criticisms of ideal theory, see GERALD GAUS, THE TYRANNY OF THE IDEAL: JUSTICE IN A DIVERSE SOCIETY (2016).

169. *See, e.g.*, VISCHER, *supra* note 82, at 195–96 (suggesting that the abuses at Enron may have been avoided had Ken Lay followed his religious beliefs in managing the company).

170. *See, e.g.*, Johnson, *Re-Enchanting*, *supra* note 6, at 102–03.

171. *Id.*

172. *See* Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 947–63 (2018); *see also* Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 149 (Micah Schwartzman et al. eds. 2016).

173. Examples of divergence between religious and public norms include disagreements over the use of contraception, *see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014), payment of social security taxes, *see* United States v. Lee, 455 U.S. 252 (1982), and payment of a minimum wage, *see* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

vocal about those beliefs in the political sphere. But there is reason to doubt that more religious justifications in the political sphere would be desirable.[174] At the very least, it seems an unconvincing basis on which to change longstanding assumptions about corporate governance in a diverse modern marketplace.

III. SOCIETY

This Part investigates the claim that corporate conscience should be grounded not in the personal beliefs of shareholders or managers, but instead in the interests of society as a whole. It argues that although this socialized view of corporate conscience identifies the correct ends of corporate law and governance, its prescribed means are ultimately self-defeating.

A. Socialized Corporations

The socialized view of corporate conscience begins by trying to shift focus away from shareholder profit and toward a broader conception of social wealth. It says that if left to their own devices, modern business corporations cannot be expected to act with an appropriate degree of conscience.[175] Corporations, on this view, are amoral entities that will pathologically seek profit for shareholders while ignoring society as a whole.[176] The only way to change this sad state of affairs is to inject some concern for others through the long arm of the law.[177]

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174. *See* RAWLS, *supra* note 50; *see also* CECILE LABORDE, LIBERALISM'S RELIGION (2017); JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2011); Jonathan Quong, *On the Idea of Public Reason*, *in* A COMPANION TO RAWLS 265–80 (Jon Mandle & David A. Reidy eds., 2014).

175. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 134, 143; *see also* Greenfield, *Corporate Persons*, *supra* note 7, at 329 ("Humans have consciences; corporations do not. Left to themselves, they will behave as if profit is the only thing that matters.").

176. *See* Kent Greenfield, *Saving the World with Corporate Law*, 57 EMORY L.J. 947, 951 (2008) [hereinafter Greenfield, *Saving the World with Corporate Law*] (arguing that corporations fail in part because they are "amoral"); Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 7 (2008) [hereinafter Greenfield, *Reclaiming Corporate Law*] (arguing that the corporation has "no conscience of its own"); *see also* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 2 (2004) (describing the corporation as a "pathological institution").

177. The socialized view offers a variety of proposals designed to induce corporate managers to act in the interests of society. One common proposal is to expand corporate fiduciary duties to cover a wider group of "stakeholders"—including employees, customers, suppliers, and local communities. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 148. The literature on "stakeholder" theory is now vast, but the path-breaking work was R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984). For more recent overviews of the field, see Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation:*

At first glance, socialized management does not look all that different from the mainstream view of corporate law. Indeed, as two of the mainstream view's most prominent expositors put it, "All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in the social calculus than do the interests of any other members of society."[178] That is, corporate enterprise should be judged on its ability to produce wealth for *everyone*—to maximize the "size of the pie"—and shareholders do not have any special moral claim to that wealth.[179]

This agreement on the *ends* of corporate governance, however, gives way to a fundamental disagreement about the *means* of achieving social wealth. Both the mainstream view and the socialized-management view hold that the government needs to regulate corporate externalities—that is, to make sure that businesses internalize the full costs of their activities.[180] But advocates of socialized management contend that externality regulation is not enough, nor is it even the best way to address corporate harm. Instead, they argue for changes to the internal relationships typically thought to compose the domain of corporate law.[181] These internal reforms would focus on

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Concepts, Evidence, and Implications, 20 ACAD. MGMT. REV. 65 (1995); and R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART (2010). Another proposal recommends at least some measure of board representation for these corporate stakeholders. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 149. Instead of board representation, Lawrence Mitchell has argued for board entrenchment. Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 (1992). Finally, proponents of socialized management advocate mandatory disclosure rules that would cover the social effects of businesses in addition to their financial condition. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 149; *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (arguing that the Securities and Exchange Commission should require expanded "social disclosure" by public companies). The unifying theme of these proposals, though, is an effort to ensure that corporate managers act in society's best interests, rather than only in the interests of corporate shareholders.

178. Hansmann & Kraakman, *supra* note 79, at 441.

179. *See id.*; *see also* John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 28 (2d ed. 2009) ("As a normative matter, the overall objective of corporate law—as of any branch of law—is presumably to serve the interests of society as a whole."). This conception of social welfare puts aside more difficult questions about the proper balance between welfare and conceptions of fairness. For important work on that topic, see Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173 (2000); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); and Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

180. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 128; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 23, 38 (1991).

181. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 146; Greenfield, *Saving the World with Corporate Law*, *supra* note 176, at 974.

ordinary principles of corporate governance and the nature of the fiduciary relationships within firms.[182]

The leading proponent of socialized management offers what seems to be a simple argument for this fundamental rearrangement. He argues that externality regulation typically occurs after the fact—that is, it happens after something has gone terribly wrong and the law needs to come in and clean things up.[183] This kind of reactive regulation is thought to be insufficient. The better course, on this view, would be to empower people inside the corporation to take social wealth into account before things go wrong. Those people have better information about the conditions of the firm and the costs that it is likely to impose on third parties.[184] This superior information, in turn, will allow insiders to avoid the social costs of corporate misbehavior before they are incurred.[185]

At the heart of this model is the conviction that it is "ironic" or "awkward" to say that corporations can promote social wealth if their participants ignore it in their day-to-day affairs.[186] Rather than sticking their heads in the sand, corporate managers should instead be more closely attuned to the needs of society. In other words, they should adopt social wealth as their explicit goal and make their decisions in direct pursuit of that goal.[187]

B. The Trouble with Social Conscience

There is some intuitive appeal to the notion that if we want corporations to produce social wealth, then we should not ask managers to ignore it. But if managers are supposed to aim directly at promoting social wealth, then they would face a serious epistemic hurdle. The basic problem is that, aside from avoiding the most egregious abuses, corporate managers are not likely to be very good at determining what

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182. *See supra* note 177.

183. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 140–42.

184. *See id.* at 141.

185. *See id.* at 140–42; Greenfield, *Saving the World with Corporate Law*, *supra* note 176, at 974.

186. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 126 (characterizing the mainstream view of corporate law as ironic); *id.* at 136 (arguing that it is "truly awkward" to think that corporate managers promote social wealth by ignoring it).

187. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 129, 133, 135, 141; Greenfield, *Saving the World with Corporate Law*, *supra* note 176, at 952, 974. Professor Greenfield also makes sophisticated arguments sounding in distributive justice and workplace fairness. Those arguments are addressed below and considered in greater detail in Nelson, *supra* note 147.

will lead to more social wealth. In the mine-run of cases, managers simply do not have enough information to make these kinds of decisions.[188]

The main reason for this difficulty is that the information managers would need to determine proper social ends is widely dispersed and highly complex.[189] Good corporate managers are noted for their ability to attend to the needs of their own businesses and their bottom lines. They are, or should be, expert in their own organizations and capable of executing beneficial transactions for their firms. But there is little reason to believe that even the best corporate managers are particularly adept at knowing what is in the best interests of an entire society.[190]

On the traditional view, this epistemic problem can be addressed through competition.[191] In a market economy, competition leads to the emergence of a set of prices that conveys critical information to other market participants. Indeed, on one influential account, the chief benefit of competition is that it serves as a "discovery procedure" that allows people to acquire and communicate knowledge to which no one person has access.[192] The price system, in turn, serves to coordinate the actions of many different people, none of whom need to know the full story of how those prices were determined to make socially beneficial decisions.[193]

It is through this decentralized system of prices that competition leads to allocative efficiency.[194] When firms compete to gain market share, they tend to move toward more efficient methods of production. These gains in efficiency allow them to offer consumers lower prices

188. *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) [hereinafter Hayek, *Use of Knowledge*]; *see also* David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 70 (1979) ("[M]anagement cannot be expected to discern, on a regular basis and with any degree of certainty, that particular acts of substantive altruism are called for by consensus social goals.").

189. *See* Hayek, *Use of Knowledge*, *supra* note 188, at 519–22.

190. *See* Friedman, *Social Responsibility*, *supra* note 51. Perhaps the social-conscience claim could be stated more modestly. Instead of claiming that managers should aim directly at social wealth in making their decisions, one could argue for a sort of "do no harm" principle, according to which managers simply seek to avoid conduct that harms the interests of society. But even this modest "do no harm" claim appears parasitic on a substantive view of what promotes social wealth, and therefore it is subject to the same kinds of epistemic limitations I am describing.

191. *See, e.g.*, Hayek, *Use of Knowledge*, *supra* note 188, at 521.

192. *See* F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 67–70 (1979) [hereinafter HAYEK, LAW, LEGISLATION AND LIBERTY]; *see also* Hayek, *Use of Knowledge*, *supra* note 188, at 520.

193. *See* HAYEK, LAW, LEGISLATION, AND LIBERTY, *supra* note 192, at 68–69.

194. *See* CARL MENGER, PRINCIPLES OF ECONOMICS 191–225 (2007).

than their competitors. The downward pressure on prices forces other producers to respond in kind—to adapt or face failure. As firms continue to engage in this iterative process of competition, prices fall until they reach the point at which markets clear.[195] This is not necessarily advantageous for individual producers who might rather charge monopolistic prices in a noncompetitive environment. But the market system is a sort of "institutionalized collective action problem"[196] that reveals the least-cost provider of goods and services and, in turn, allows for resources to flow toward their most valued uses. The result of this competitive process is a massive gain in social wealth.[197]

The profit motive, for its part, is what sustains this competitive system. If producers are aiming not at overall social good, but instead at what will deliver the most profit for their own firms, then they will put their knowledge and skills to work in creating valuable products and services at the lowest cost.[198] And as firms attempt to gain market share by operating more efficiently, resources will flow to the most efficient producers. The contention here is certainly not that profit seeking is intrinsically good. Instead, the profit motive gives market participants the right incentives to compete, which in turn allows the price system to perform its allocative function.[199]

With these familiar principles in mind, it becomes easier to see why commentators worry about the efficiency losses that might attend relaxation of the profit motive.[200] By instructing managers to consider, first and foremost, the interests of society as a whole, socialized management undercuts the informational advantages of robust market competition. If managers are no longer expected—either by law or by ethical custom—to compete in the primary hopes of increasing firm profits, then prices will be less capable of aggregating and conveying information that would help guide society's allocation of resources. The result will be distorted markets and socially inefficient production decisions.

Of course, in the real world, markets are imperfect. Mainstream corporate law commentators have long recognized this inescapable fact, but they argue that the government can minimize the consequences of

195. *See* HEATH, *supra* note 50, at 9.
196. *Id.* at 99.
197. *See* MENGER, *supra* note 194, at 222–25.
198. *Id.* at 224–25.
199. *See* HEATH, *supra* note 50, at 7.
200. *See, e.g.*, Hansmann & Kraakman, *supra* note 79, at 443–44.

imperfect competition by regulating externalities.[201] A classic example would be passing environmental laws aimed at curbing the social costs of pollution. On the conventional view, the government should enact across-the-board regulations that would force companies polluting the environment to internalize the costs of their activities.[202] Doing so would change the "prices" firms confront, but it would leave intact their basic orientation toward maximizing profit.[203]

Proponents of socialized management argue that the better course would be not simply to change the prices that firms encounter, but also the overall goal at which they are aiming.[204] The leading advocate of socialized management devotes significant attention to the example of pollution.[205] In his view, the mainstream account counsels companies to pollute as much as they want, and then asks the government to tax those companies for the cost of cleanup.[206] But the socialized-management view argues instead that we should change the calculus *inside* of firms by requiring management to account for environmental interests along with a host of other goals in making business decisions.[207] The case for socializing management, then, rests on the idea that businesses themselves have better information about how to avoid pollution at low cost, and that the social cost of cleanup would vastly exceed the cost of preventative measures.[208]

But there are a few ways in which this analysis is unsatisfying. First, it seems to ignore the fact that reactive regulatory measures can have profound effects going forward. For example, if the government imposes pollution regulations that cost firms money, those regulations will be subject to ex ante price internalization.[209] In other words, if

201. *See* Easterbrook & Fischel, *supra* note 180, at 38; Hansmann & Kraakman, *supra* note 79, at 442.

202. *See* Easterbrook & Fischel, *supra* note 180, at 38; *see also* ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (1920); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

203. *See* Easterbrook & Fischel, *supra* note 180, at 38. This analysis assumes that businesses are not able to skew the political process in their favor through lobbying or election spending. For a recent discussion of corporate political influence, see Leo E. Strine, Jr., & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 390 (2015). For skepticism about the extent of corporate political influence, see Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 COLUM. L. REV. SIDEBAR 39, 45–48 (2015).

204. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 135–41.

205. *Id.* at 141–42.

206. *Id.* at 141.

207. *Id.* at 134–42.

208. *Id.* at 141–46.

209. *See* PIGOU, *supra* note 202; POSNER, *supra* note 202; *see also* WILLIAM J. BAUMOL, WALLACE E. OATES & SUE ANNE BATEY, ECONOMICS, ENVIRONMENTAL POLICY, AND THE QUALITY OF LIFE 230–45 (1979); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004);

regulation "raises the price" of pollution—as the mainstream corporate law crowd would have it—that price will be accounted for in firms' pollution decisions in the future. To be sure, externality regulation will be imperfect, especially for industries in which regulated parties exert significant political influence over their regulators.[210] Yet even imperfect externality regulation will influence profit-maximizing firms' decisions regarding pollution, and will do so without fundamentally changing those firms' basic operating goals.[211]

In addition, when we use externality regulation to raise the price of corporate pollution, we still allow firms to compete over who can achieve compliance at the lowest cost. Before the regulation goes into effect, it may not be clear which firms will come out ahead. But again, the process of market competition will reveal who can adapt to the new regulatory environment and operate most efficiently. In fact, it may well be the case that a firm can figure out how to engineer its production process so that it avoids pollution at lower costs than anticipated.[212] And that's because without a competitively structured environment in which producers are led by their own interests in profit, it would not be possible to discover the true costs of reducing pollution.[213] And so, changing firms' overall goal, and not simply the prices they confront, may not only reduce corporate wealth, but may also diminish firms' incentives to develop innovative solutions to the problem of pollution itself.[214]

Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 100–04 (2015) (discussing the theory of Pigouvian taxation); Steven Shavell, *Corrective Taxation Versus Liability as a Solution to the Problem of Harmful Externalities*, 54 J. L. & ECON. S249 (2011).

210. *See* Strine & Walter, *supra* note 203; *see also* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 269 (2015) ("Concentrated, moneyed interests, represented by those in control of the country's largest business corporations, are increasingly able to turn law into a lottery, reducing law's predictability, impairing property rights, and increasing the share of the economy devoted to rent-seeking rather than productive activity."); Hart & Zingales, *supra* note 45, at 249 ("Like many people these days (and maybe always), we are not that sanguine about the efficiency of the political process.").

211. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 591 (2003) ("General welfare laws designed to deter wrongful corporate conduct through criminal and civil sanctions imposed on the corporation, its directors, and its senior officers are more efficient than stakeholderist tweaking of director fiduciary duties, which by virtue of their inherent ambiguity are a blunt instrument.").

212. *See* HEATH, *supra* note 50, at 223–24 (discussing how the introduction of a market for sulfur dioxide emissions permits revealed that reducing emissions was much cheaper than industry participants and regulators had predicted).

213. *See id.* at 224; *see also* TIM HARFORD, THE UNDERCOVER ECONOMIST: REVISED & UPDATED 102–04 (2012) (discussing the EPA's efforts to reduce sulfur dioxide emissions).

214. For an argument along these lines, see Frank Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1447–48 (1989):

These well-known market dynamics, in turn, make it hard to see the mainstream view of corporate law and policy as "ironic" or "awkward." It does not take some leap of faith in the invisible hand to see the efficiency benefits of competition.[215] Motivated by the prospect of making a profit, businesses compete for market share. In doing so, they are engaged in a deliberately adversarial process that harnesses the profit motive in service of socially efficient resource allocation.[216] And so the idea that competition channels individual interests into socially beneficial results is not strange—it is the whole point of the modern market system. Managers are simply playing their important—but highly circumscribed—role in that system.[217]

At this point, a proponent of socialized management might offer several replies. One claim might be that socialized management is not only concerned with promoting social wealth, but also with the *fair distribution* of that wealth.[218] This is a serious objection to the traditional view of corporate law, which tends to focus on promoting social wealth and typically kicks concerns about distributive justice to other areas of the law, especially tax law.[219]

Arguments grounded in the efficiency of competitive markets cannot fully answer this egalitarian objection. That is, no matter how

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> Nothing in our approach asks whether political society should attempt to make firms behave as if they have the welfare of nonparticipants in mind. . . . Society must choose whether to conscript the firm's strengths (its tendency to maximize wealth) by changing the prices it confronts, or by changing the structure so that it is less apt to maximize wealth. The latter choice will yield less of both good ends than the former.;

see also ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 33 (1776) ("By pursuing his own interest, he frequently promotes that of the society more effectually than when he really intends to promote it.").

215. The term "invisible hand" comes from ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759); and ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

216. HEATH, *supra* note 50, at 93–115.

217. Joseph Heath makes an analogy to criminal defense lawyers. He notes that the criminal justice system is designed to be adversarial, and that the role of defense lawyers is circumscribed accordingly. They are supposed to provide zealous advocacy for their clients (within limits); they are not supposed to aim at "justice" directly. HEATH, *supra* note 50, at 84–85. For more on the distinction between criminal defense lawyers' "narrow goal" and the "broad goal" of the criminal justice system, see LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 82 (2001).

218. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 145–46 (arguing that corporate law should also promote distributive justice).

219. *See, e.g.*, ALLEN & KRAAKMAN, *supra* note 126; ROBERT W. HAMILTON, JONATHAN R. MACEY & DOUGLAS K. MOLL, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES (11th ed. 2010); WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS (9th ed. 2015).

well the price mechanism works to allocate resources efficiently in society, concerns about fair distribution will retain much of their force. What the argument from competition can do, however, is cast the egalitarian objection as a rather stark trade-off. If one wishes to move toward a socialized model of the modern business corporation, it is critical to notice that this move would come with significant losses in efficiency.[220] Those losses may or may not be justified once we balance the benefits of a more egalitarian marketplace against the burdens of socially inefficient resource allocation. At the very least, a proponent of the fairness version of socialized management would need to show why distributional goals are best carried out by corporate managers rather than by a government-coordinated progressive tax program.[221]

In any event, if socialized management is understood as primarily aimed at promoting overall social wealth, then it should be seen as largely self-defeating. The profit motive is the engine for a competitive market economy. It leads businesses to compete in hopes of capturing the most value for their own firms. These competitive activities, mediated through the price system, provide critical information about what should be produced, where it should be produced, and by whom it should be produced. There is no single actor—not a central planner and not a corporate manager—that can match the price system in ensuring that resources flow to their most valued uses.[222]

A proponent of socialized management might instead reply that the theory is primarily concerned with building wealth for corporate "stakeholders" and not necessarily with promoting the interests of society as a whole.[223] As an initial matter, it is worth noting that broad definitions of who counts as a stakeholder threaten to make this distinction illusory. For example, if the term stakeholder includes not only employees, customers, and creditors, but also suppliers, local

220. *See* Hansmann & Kraakman, *supra* note 79, at 443–49.

221. *See* Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL. STUD. 667 (1994). Of course, there is reason to be skeptical that such a progressive tax program will be politically feasible in the near future. *See* Tax Cuts and Jobs Act of 2017, Pub L. No. 115-97, 131 Stat. 2054.

222. *See* Hayek, *Use of Knowledge*, *supra* note 188, at 520–27. For the argument that stakeholder management in the United States would lead to a global flight of capital, see D. Gordon Smith, *The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1005–09 (2008).

223. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 142 ("[C]orporations have a comparative advantage in building wealth for all of its stakeholders.").

communities, and even governments, then there is no longer a clear distinction between corporate stakeholders and society as a whole.[224]

But if proponents of socialized management were to adopt a more constrained version of stakeholder theory—setting tighter parameters for who qualifies—then there might be some question about the moral arbitrariness of this decision.[225] Say, for example, that only current employees would count as stakeholders. Indeed, stakeholder theorists often pay a great deal of attention to improving the place of workers in corporate law.[226] But it is not obvious from a moral point of view why workers' interests are more important than those of other corporate constituents, such as creditors, customers, or members of the local community. Now it might be the case that employees are especially vulnerable to managerial authority, given their firm-specific investments.[227] But that vulnerability does not provide a convincing reason to give their interests lexical priority over the interests of other constituents that might be thought to have a "stake" in the firm.[228]

Some have suspected that the actual stakeholders selected for firms' attention—even if it is less than socialized-management advocates would like—are the ones who have been able to muster the most political power to make their voices heard. This is known as the "squeaky wheel" problem—the stakeholder that screams the loudest gets the most attention.[229] As a descriptive matter, this account is quite convincing. But it hardly provides a satisfying normative argument for distinguishing among potentially deserving stakeholders.

A final reply from socialized-management theorists might be that the goals of profit maximization and overall social wealth are not always at odds. By acting in the interests of society as a whole, that is, businesses can earn favorable reputations that will translate into

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224. *See* Samantha Miles, *Stakeholder: Essentially Contested or Just Confused?*, 108 J. BUS. ETHICS 285 (2012); Eric Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605, 608 (2009); *see also* R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART 206–08 (2010) (acknowledging difficulties with broad versions of stakeholder theory).

225. *See* HEATH, *supra* note 50, at 82; *see also* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1269 (1982) (questioning the priority of current employees over prospective employees).

226. *See, e.g.*, Bodie, *supra* note 144; Greenfield, *supra* note 143; O'Connor, *supra* note 7; Marleen O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

227. For a discussion of employees' firm-specific investments, see *supra* notes 152–159 and accompanying text.

228. HEATH, *supra* note 50, at 82–83.

229. *See id.* at 82.

customer loyalty, long-term growth, and prosperity.[230] But it is important to notice that this reply fundamentally changes the terms of the argument from social wealth. Socialized-management advocates insist on the need for legal reform.[231] Things are bad with the corporate law world—it is failing and has failed us—and we need to use the full arsenal of the law to do something about it.[232] Socialized management, in other words, is focused on what businesses owe to the rest of society. It is not about how businesses can find a creative and friendly way to make more money. That might be an appealing *strategic* theory of corporate conscience—and one to which many, if not most, mainstream commentators would have no objection. But that view marks a stark departure from the normative aspirations with which the socialized-management argument began.

One need not be entirely negative about the idea of socializing corporations. As those prominent mainstream corporate law commentators observed, thoughtful people agree that corporate enterprise should be judged by its ability to produce social wealth.[233] But this agreement on the proper ends of corporate law and practice soon gives way to a radically different vision as to the best means of achieving the consensus goal. In the end, the idea that we should encourage managers to aim directly at overall social wealth, and not just at profits for their own firms, turns out to be self-defeating. It does not take sufficient account of the efficiency properties of modern markets. In particular, it ignores the role of the profit motive in providing incentives for competition—competition that allocates available social resources in the most productive and least wasteful manner. And so, while the idea of socialized management may have its

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230. This claim is often referred to as the "business case" for corporate social responsibility. For different versions of the claim, see Bryan W. Husted & José de Jesus Salazar, *Taking Friedman Seriously: Maximizing Profits and Social Performance*, 43 J. MGMT. STUD. 75 (2006); Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, 89 HARV. BUS. REV. 62 (2011); Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78 (2006); and David J. Vogel, *Is There a Market for Virtue? The Business Case for Corporate Social Responsibility*, 47 CAL. MGMT. REV. 19 (2005). It also falls within the category of "instrumental" or "strategic" stakeholder theory. *See* Michael L. Barnett & Robert M. Salomon, *Beyond Dichotomy: The Curvilinear Relationship Between Social Responsibility and Financial Performance*, 27 STRATEGIC MGMT. J. 1101 (2006); Donaldson & Preston, *supra* note 177, at 77–81; Amy J. Hillman & Gerald D. Keim, *Shareholder Value, Stakeholder Management, and Social Issues: What's the Bottom Line?*, 22 STRATEGIC MGMT. J. 125 (2001); Thomas M. Jones, *Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics*, 20 ACAD. MGMT. REV. 404 (1995).

231. *See* GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 134–42 (arguing that corporate law must change in a variety of ways to promote social wealth).

232. *Id.*

233. *See* Hansmann & Kraakman, *supra* note 79, at 442.

heart in the right place, it cannot provide an adequate substitute for the marketplace as we know it.

IV. BEYOND CONSCIENCE

The previous Parts demonstrate that the leading arguments for corporate conscience fail in critical respects. Shareholder conscience is impractical. Moralizing managers are illegitimate. And socialized corporations are inefficient.

Although mostly critical, this analysis need not be dispiriting. If we are to move toward a more sophisticated moral theory for the modern corporate world, we first need to do some serious ground clearing. More specifically, we need a sharper sense of the various concepts at play and an account of whether any of them survive scrutiny.

By doing this conceptual work, in turn, we can begin to see a path forward. The business world may not be amenable to all kinds of moralization. But that does not mean it is without morality entirely. Indeed, lurking underneath this Essay's various criticisms of corporate conscience is the idea of an "implicit morality of the market"[234]—a logic to the modern commercial world—even if that morality resists leading attempts to give corporations a conscience.

Though short of a comprehensive account, the failure of existing arguments furnishes three initial lessons for this implicit morality. First, as a matter of practical implementation, any implicit morality must be realistic about the structure of modern corporations and capital markets.[235] Theories of morality in the market that do not account for pervasive social norms or institutional dynamics are not likely to gain much traction in the real world.[236]

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234. Christopher McMahon, *Morality and the Invisible Hand*, 10 PHIL. PUB. AFF. 247, 254 (1981); *see also* Wayne Norman, *Is There 'a Point' to Markets? A Response to Martin*, 2 BUS. ETHICS J. REV. 22, 23 (discussing McMahon's account of the "implicit morality of the market"); HEATH, *supra* note 50, at 173 (same). To the degree that these principles also address relationships within firms, perhaps it would be more accurate to call it the implicit morality of *economic organization*. *See* Coase, *supra* note 146 (distinguishing between firms and markets); *see also* Nelson, *supra* note 147 (discussing Coase's theory of the firm).

235. For an excellent discussion of how theories of business ethics must contend with facts about the market for corporate control, see Gabriel Rauterberg, *The Corporation's Place in Society*, 114 MICH. L. REV. 913 (2016) (reviewing JOSEPH HEATH, MORALITY, COMPETITION, AND THE FIRM: THE MARKET FAILURES APPROACH TO BUSINESS ETHICS 94 (2014)).

236. *See* Leo E. Strine, Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165 (2017); *see also supra* note 168 (discussing the distinction between ideal and nonideal theory).

Second, the implicit morality of the market should take account of widespread diversity in modern corporations. It should not endorse any particular set of comprehensive philosophical or religious principles.[237] It should provide employers and employees alike with the "moral space" necessary to live integrated lives.[238] But it should not allow managers to use the power of corporate hierarchy to impose their own views of the good on others.

Third, the implicit morality of the market must be compatible with the underlying institutional rationale for a market economy. Some principles of moral theory—developed in the context of family or community relations—are simply not appropriate for the market sphere. Concern for a sibling's financial hardship does not translate into concern for a competitor's lost profits. Parents and teachers should work together on educational standards; competitors should not work together on prices.

At this point, one might object to the whole project of searching for an implicit morality of the market. The most likely grounds for this objection would be that, by looking to the design of the system we currently have, this method of reasoning about morals in business favors the status quo. To put the point another way, by probing our current practices for guidance about how businesses should act, we are relying on contingent facts about the world as it is instead of engaging our critical faculties and imagining the world as it might be. On this view, working out an implicit morality of our economic system is either complacent or, worse yet, cynical.[239]

There is something tempting about the idea of scrapping the system we have, with all its faults, and trying to reimagine the corporate world in fundamental ways. But idealism has its drawbacks. Perhaps the most serious is that it is overwhelmingly likely to succumb to deep—and permanent—disagreement about the best state of the world. And, indeed, this deep disagreement has played out over decades in law and business scholarship with no clear winner among the numerous comprehensive theories of corporate morality.[240]

As these foundational debates about morality in business go on—and do so interminably—it would be a mistake to neglect normative theorizing about the economic system we actually have. That

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237. *See* Nelson, *supra* note 147.

238. For use of this term in the business ethics literature, see Blanc, *supra* note 157.

239. I thank Berta Esperanza Hernandez-Truyol for raising this objection.

240. *See* Norman, *supra* note 234, at 22 (noting that debates in business ethics "have long been Balkanized by overly ideological 'theories' ").

is, the task of developing an implicit morality of the market should not—and cannot—displace revolutionary thinking about business and the proposals for radical reform that grow out of that thinking. But in the meantime, there is room for a more pragmatic program that seeks to identify widely shared principles for economic cooperation in a modern market economy. In doing so, we can largely sidestep—or "bracket"—the most intractable debates over morals in business and instead look to interpret the modern corporate world in its most coherent and attractive form.

One important component of this interpretive project is to foreground the commercial aspect of business corporations. Not every institution needs to save the rainforest. Not every institution needs to advocate for social justice. And not every institution needs to save souls. Nonprofit organizations have long pursued these goals and done so vigorously. To be sure, the distinction between nonprofit organizations and for-profit businesses is blurry around the edges,[241] and no organization can avoid commerce entirely.[242] But lines can—and have—been drawn,[243] and those lines need to be defended according to the characteristic advantages of different kinds of organizations.[244]

The characteristic advantage of business corporations is that they are powerful tools for producing wealth. Indeed, the corporate form is the dominant vehicle for organizing large-scale enterprises around the world.[245] Even the most ardent proponents of corporate conscience find it difficult to resist this conclusion.[246]

241. *See* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 468–72 (2015) (describing arguments supporting the claim that the distinction between businesses and nonprofits is elusive); *see also* Margaret M. Blair, *Corporations and Expressive Rights: How the Lines Should be Drawn*, 65 DEPAUL L. REV. 253 (2016) (discussing the line-drawing difficulties involved in determining which kinds of organizations should enjoy particular constitutional rights); Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597 (2016) (same).

242. *See* Nelson, *supra* note 241, at 470; Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2167 (2001); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1927 n.49 (2001).

243. *See* Blair, *supra* note 241 (defending line drawing that focuses on the "people" associated with the organization and the organization's "purpose"); Nelson, *supra* note 241 (defending a line between for-profit and nonprofit organizations for purposes of freedom-of-association doctrine).

244. *Cf.* Frederick Schauer, *Necessity, Importance, and the Nature of Law*, *in* NEUTRALITY AND THEORY OF LAW 17–31 (Jordi Ferrer Beltrán et al. eds., 2013) (defending a jurisprudential approach that focuses on "the concentrated presence of non-essential properties").

245. *See* ALLEN & KRAAKMAN, *supra* note 126, at 75 ("From Delaware to Dushanbe, the corporation is the standard legal form adopted by large-scale private enterprises."); Armour et al., *supra* note 179, at 1, 2 ("[I]n market economies, almost all large-scale business firms adopt a legal form that possesses all five of the basic characteristics of the business corporation.").

246. *See, e.g.*, GREENFIELD, FAILURE OF CORPORATE LAW, *supra* note 6, at 142 (acknowledging that "corporations have a comparative advantage in building wealth for all of its stakeholders").

Nevertheless, theorists of corporate conscience press on, claiming that business corporations can be refashioned as tools to serve our deepest moral ambitions.[247] But corporate refashioning has its costs. When tools intended for one purpose are systematically employed to serve secondary purposes, friction and distortion are inevitable. As one commentator famously observed, "If there is no hammer, and if the pipe wrench sits on the top shelf of the tool chest, then the pipe wrench more than any of the other tools in the chest may over time lose its ability to perform the function for which it was originally designed."[248] Business corporations were designed to produce wealth for society. We should be wary of attempts to co-opt their characteristic advantage for largely unrelated purposes.

Reinforcing the normative grounding of different organizational forms might also produce benefits in terms of private ordering. To the extent that these forms provide "off-the-rack" sets of contractual default terms, it may be desirable to have a menu of genuinely distinctive options. That is, if different kinds of organizations provide different arrangements of default terms based on the goals of organizers, then those organizers will benefit ex ante from clarity and stability in their choice of organizational form.

Focusing on corporations' characteristic advantage in producing wealth, however, does not provide businesses with an ethical free pass. Business corporations may not be ideal vehicles for developing our deepest values and commitments,[249] but their central role in the distribution of basic resources carries certain moral side-constraints.[250] For example, corporate managers should refrain from using corporate power to undermine the preconditions for competitive markets.[251] Managers might fail to fulfill this obligation by lobbying the government to maintain existing market failures that work in their favor or by advocating for laws that create new anticompetitive advantages.[252]

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247. *See, e.g.*, Strine, *Power Ratchet*, *supra* note 112 (adopting the view that corporations are human creations that should suit the purposes of their creators).

248. Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175, 195 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

249. *See* Nelson, *supra* note 38, at 1575–610.

250. On the idea of moral side constraints, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–53 (1974). Nozick's discussion of moral side constraints is also noted in HEATH, *supra* note 50, at 90.

251. *See* HEATH, *supra* note 50. This point is a key aspect of Joseph Heath's highly influential "market failures" approach to business ethics.

252. *Id.* at 113; Pierre Yves-Neron, *Business and the* Polis*: What Does It Mean to See Corporations as Political Actors?*, 94 J. BUS. ETHICS 333, 344 (2010); *see also* Coates, *supra* note

The implicit morality of the market should also include a commitment to preserving broad access to economic opportunities without regard to one's particular identity or creed. This ethic of toleration is not only morally attractive, but it is also deeply embedded in social practice, especially within large firms.[253] The best interpretation of the modern corporation as a social institution must be one that vindicates norms of nondiscrimination and equal access.

Last, but not least, the implicit morality of the market should include a presumption in favor of transparency. Modern securities laws already reflect the value of transparency by requiring public companies to provide a great deal of information to shareholders via mandatory disclosure rules.[254] Those rules contribute in important ways both to share-price accuracy and to controlling wasteful agency costs.[255] But capital markets are not the only markets that benefit from low-cost access to reliable information about firms.[256] If corporations are to live up to their promise of promoting broad social wealth, then the implicit morality of the market should also include a commitment to relieving informational deficits throughout the economy.

This discussion of implicit principles is not meant to be exhaustive. Instead, it seeks only to provide an initial sketch. Yet even this initial sketch can serve as a guide for commentators who wish to avoid the false starts of corporate conscience and work toward a more promising view of morality in modern business.

CONCLUSION

Corporate reform can be a frustrating enterprise. All too often, conventional legal tools are not up to the task for which we seek to use them. The business world is complex, and its participants are sophisticated and highly motivated to gain advantages. Under these circumstances, it is tempting to look for structural solutions that might address business failures on a systemic level.

210, at 268–75 (criticizing corporate rent-seeking through use of the First Amendment); Strine & Walter, *supra* note 203 (arguing that there is a tension between corporate political activity and traditional corporate theory's reliance on externality regulation to police the marketplace).

253. *See* ESTLUND, supra note 163.

254. *See* Regulation S-K, 17 C.F.R. pt. 229 (2018).

255. Paul Mahoney distinguishes two kinds of efficiency arguments for mandatory disclosure rules under the U.S. securities laws: the "accuracy enhancement" model—concerned with share price accuracy—and the "agency cost" model. Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995).

256. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

The idea of corporate conscience looks promising from this systemic perspective. It goes beyond typical approaches to legal regulation and tries to reform the marketplace from within. The three prevailing accounts of corporate conscience differ in significant ways, and it is important to pull them apart and see the logic of arguments in favor of each. Unfortunately for their proponents, though, none of these accounts hold up to scrutiny.

But all is not lost for champions of corporate morality. Although the leading accounts of corporate conscience fall short, they all do so in illuminating ways, bringing into sharp relief the minimum requirements for a successful theory. Any attempt to rehabilitate the idea of corporate conscience must take these minimum requirements seriously.